82-55

Office - Supreme Court, U.S.
FILED
JUL 12 1982
ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

No. _____

OCTOBER TERM, 1982

City of West Helena, Arkansas, Mayor Jesse Porter, City Councilmen Bob Teeter, Dick Cunningham, Tommie Dial, Charles Miles and Dwight Galloway, *Appellants*,

V.

Reverend P.L. Perkins, Phillips County Concerned Citizens, Sam Bennett, John Hamilton, Mrs. Lillie Mae Stevens, Wilson Rodgers, Reverend Julius McGruder, Welton Davis, Reverend C.W. Gilcreast and Ortha Bush, *Appellees*.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

BYRON FREELAND
MITCHELL, WILLIAMS & SELIG
1000 Savers Federal Building
Capitol Avenue at Spring Street
Little Rock, Arkansas 72201
(501) 376-3151

Attorneys for Appellants

QUESTION PRESENTED

Whether the at-large electoral system adopted by the City of West Helena, Arkansas pursuant to Ark. Stat. Ann. §19-1002 *et seq.* (Repl. 1980), was maintained for the purpose of limiting black participation in the political process in violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States and section 2 of the Voting Rights Act, 42 U.S.C. §1973.

PARTIES TO THE PROCEEDING

With the exception of the State of Arkansas, the caption of the case in this Court contains the names of all parties involved in the proceedings before the United States Court of Appeals for the Eighth Circuit. The State of Arkansas was an intervenor below, but is not participating in this appeal.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, which appears in the appendix hereto, p. A-1, *infra*, is reported at 675 F.2d 201 (1982).

The opinion of the United States District Court for the Eastern District of Arkansas, which appears in the appendix hereto, p. A-18, *infra*, is reported at 514 F. Supp. 770 (1981).

TABLE OF CONTENTS

PAGE

Question Presented ..... Index

Parties to the Proceeding ..... Index

Opinions Below ..... Index

Table of Contents ..... Index

Table of Authorities ..... Index

Jurisdiction 1

Constitutional Provisions and Statutes 2

Statement of the Case 6

The Question is Substantial 9

Conclusion 13

Certificate of Service 14

Appendix A-1

TABLE OF AUTHORITIES

Page

City of Mobile v. Bolden, 446 U.S. 55 (1980) 10

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 2

New Orleans v. Dukes, 427 U.S. 297 (1976) 2

Perkins v. City of West Helena, 514 F. Supp. 770 (E.D. Ark. 1981) A-1

Rogers v. Lodge, No. 80-2100
(Decided July 1, 1982) 11

Whitcomb v. Chavis, 403 U.S. 124 (1971) 9

White v. Regester, 412 U.S. 755 (1972) 9

In the

Supreme Court of the United States

No. _____

OCTOBER TERM, 1982

City of West Helena, Arkansas, Mayor Jesse Porter, City Councilmen Bob Teeter, Dick Cunningham, Tommie Dial, Charles Miles and Dwight Galloway, *Appellants*,

V.

Reverend P. L. Perkins, Phillips County Concerned Citizens, Sam Bennett, John Hamilton, Mrs. Lillie Mae Stevens, Wilson Rogers, Reverend Julius McGruder, Welton Davis, Reverend C.W. Gilcreast and Orta Bush, *Appellees*.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTION

The City of West Helena, Arkansas, its Mayor and City Councilmen, appeal from the final judgment of the United States Court of Appeals for the Eighth Circuit holding that the City's at-large electoral system violates the Fourteenth and Fifteenth Amendments to the United States Constitution and section 2 of the Voting Rights Act of 1965. The statutory basis for federal jurisdiction is predicated upon 42 U.S.C. §1343 (3).

The judgment of the United States Court of Appeals for the Eighth Circuit, holding that the at-large electoral system adopted by the City of West Helena, Arkansas violates the Fourteenth and Fifteenth Amendments of the United States Constitution and section 2 of the Voting Rights Act of 1965, was entered on April 13, 1982. See p. A-1, *infra*.

A Notice of Appeal to the Supreme Court of the United States was duly filed with the United States Court of Appeals for the Eighth Circuit on May 6, 1982. See p. A-33, *infra*.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (2). The jurisdiction of this Court is supported by *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *New Orleans v. Dukes*, 427 U.S. 297 (1976).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment ~~XIV~~ XV:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

28 U.S.C. §1254:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at anytime by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. §1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act

of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. §2201:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 [26 U.S.C. §7428], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

42 U.S.C. §1973:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4 (f) (2) [42 U.S.C. §1973 b (f) (2)].

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Ark. Stat. Ann. §19-1002.5 (Repl. 1980):

On the Tuesday following the first Monday in November, 1966, and every two (2) years thereafter the qualified voters of all cities of [the] first class with less than fifty thousand (50,000) inhabitants having the Mayor-Council form of government shall elect two (2) Aldermen from each ward for a term of two (2) years. The election officials shall designate the Aldermen as Alderman No. One (1) and Alderman No. Two (2).

Ark. Stat. Ann. §19-1002.7 (Repl. 1980):

Candidates for the office of Alderman in cities of the first class shall reside in the ward from which they seek to be elected, and shall run at-large, and all of the qualified electors of such cities shall be entitled to vote in such election.

Provision shall be made by the election commissioners in any cities so that the qualified electors of each ward shall have at least one (1) voting precinct in each ward where the resident electors thereof may cast their ballot.

Provided, however, that the city council of any such city is empowered and authorized to provide by ordinance that all aldermen be elected by ward, in which event each alderman shall be voted upon by the qualified electors of the ward from which such person is a candidate, and when so provided by city ordinance the name of such candidate shall appear upon the ballot only in the ward in which he is a candidate. Provided, further, that all such cities choosing to elect aldermen by ward shall provide, in the manner provided by law, for the establishment of wards of substantially equal population in order that each alderman, or aldermen, elected from each ward shall represent substantially the same number of people in the city.

STATEMENT OF THE CASE

The City of West Helena, Arkansas was incorporated in 1917 and became a city of the first class three years later. The latest census estimates the population of the City to be 11,005 and of this total 59.6% of the citizens are white and 40.4% are black. Since 1920, the City has been governed by a Council consisting of eight aldermen. The Mayor-Council form of government adopted by West Helena is sanctioned by state law, Ark. Stat. Ann. §19-1002 (Repl. 1980) *et seq.*

The City has been divided into four wards for the purposes of electing aldermen. Candidates for aldermanic positions must reside in the ward from which they seek to be elected. There are two positions in each ward and each candidate is required to designate the position he is seeking. All candidates then run for election on an at-large basis. The entire electorate is required to vote for two candidates from each ward. Candidates need only to receive a plurality of votes to win and there are no runoffs.

In 1978, Plaintiffs-Appellees, black citizens from West Helena, filed this action in the District Court for the Eastern District of Arkansas challenging the constitutionality of the at-large electoral system. Specifically, the Plaintiffs-Appellees alleged that the voting method adopted by the City diluted the voting rights of black citizens and violated the Fourteenth and Fifteenth Amendments to the Constitution as well as section 2 of the Voting Rights Act of 1965.

The history of the State of Arkansas shows evidence of unequal treatment of black citizens. However, since the passage of the Voting Rights Act of 1965 and the abolition of the poll tax in that same year, the last impediment to black voting in the State has been removed. Today, all eligible voters residing in West Helena register and vote in municipal elections for the candidates of their choice and no group is denied access to the political process.

The involvement of blacks in the political process is evidenced in several ways. Black organizations and the county election commission have conducted campaigns to register all eligible black voters. Between 1966 and 1978, twelve blacks have been candidates for counsel positions and three have been elected. Two vacancies occurred on the counsel in 1980 and two black citizens were nominated to fill the positions. However, one of the black nominees declined the appointment and a white was appointed in his place. Black candidates are able to campaign in white areas and racial tactics have never been associated with an election. Although "bloc" voting typically occurs in local elections, the black vote is vigorously sought.

Since the passage of the Voting Rights Act, blacks have increasingly become more involved in city leadership. Blacks have served on the Parks Commission, the Housing Authority, the Civil Service Commission, and worked in the Police and Fire Departments. The Mayor's Advisory Council is chaired by a black and is composed of nine other black members along with six whites. Although the involvement of blacks on City commissions has increased, there is still a need for more black participation.

There are evidences that the City Council of West Helena is not totally responsive to the requests of black citizens. However, it is undisputed that the Council meetings are open and that all citizens are free to present grievances. The aldermen have not always acted favorably, but in every instance the requests were acknowledged and discussed. Additionally, the black wards have received approximately $357,000 more in improvement funds than have the white wards.

After a trial on the merits, the District Court held that the Plaintiffs-Appellees failed to establish their Fourteenth Amendment claim because they did not prove that the City created or maintained the at-large electoral system for a discriminating purpose. It also held that the Plaintiffs-

Appellees did not have a valid Fifteenth Amendment or Voting Rights Act claim because blacks were free to register and vote in West Helena. The District Court additionally refused to exercise its pendent jurisdiction to address an issue relating to the size of the wards.

The Plaintiffs-Appellees then filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the lower court's decision that the electoral system of West Helena was not created for a discriminatory purpose, but reversed on the grounds that the West Helena at-large electoral system was maintained for a discriminatory purpose and thus violated the Fourteenth and Fifteenth Amendments of the United States Constitution and section 2 of the Voting Rights Act of 1965.

THE QUESTION IS SUBSTANTIAL

The legality of multimember legislative districts has been considered by this Court on numerous occasions and such districts have been held unconstitutional only twice. Despite repeated constitutional attacks upon multimember legislative districts, this Court has consistently held that they are not unconstitutional *per se*. *White v. Regester*, 412 U.S. 755 (1972); *Whitcomb v. Chavis*, 403 U.S. 124 (1971). The issues presented by the instant case are significant because the opinion of the Eighth Circuit, which struck down the at-large electoral scheme of West Helena, is irreconcilable with the legal standards previously articulated by this Court.

One of the earliest challenges to a multimember district electoral system was presented in *Whitcomb v. Chavis*, 403 U.S. at 124. In *Whitcomb*, it was determined that the Equal Protection Clause of the Fourteenth Amendment had not been violated even though the challenged multimember district electoral system used in Marion County, Indiana resulted in the election of disproportionately few of that county's black citizens. This Court held:

> We have discovered nothing in the record or in the Court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when the legislative candidates were chosen.

Id. at 149.

Appellants urge that the principles articulated in *Whitcomb* were not adhered to by the Eighth Circuit when it declared the at-large electoral system of West Helena to be unconstitutional. The record indicates that the black citizens of West Helena are free to participate in the political process and that they register and vote for the candidates of their choice. Blacks have participated in voter registration drives

and have succeeded in electing three of the twelve black candidates that have run for alderman. Recently, two black citizens were nominated by the Council to fill vacancies which had occurred. Although the history of the City evidences a low involvement of blacks on various City commissions in the past, it is clear that significant improvements have been made. Blacks have served on the Parks Commission, Civil Service Commission and on the Housing Authority. The Mayor's Advisory Council is chaired by a black and has nine other black members. The City has also become more responsive to the needs of its black citizens. All grievances which are brought to the attention of the Council are discussed and a disproportionately high percentage of all improvement revenues are expended in black areas. Clearly, blacks are free "to participate in [the] affairs" of West Helena. *Id.*

The decision *Whitcomb* was reaffirmed in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Although there is much confusion arising out of the *Bolden* decision, the plurality held, on facts much more extreme than those found to exist in West Helena, that the at-large electoral system in Mobile did not violate the Constitution. The electoral system was upheld despite the fact that the City had never elected a single black citizen to the City Commission. This stands in contrast to West Helena which has elected three of twelve black candidates and which has nominated two blacks to fill vacancies on its Council. Candidates in *Bolden* were forced to win elections by a majority of votes whereas only a plurality is required in West Helena. The Court in *Bolden* found evidence to suggest that the legislature passed the at-large election law to prevent blacks from becoming members of city commissions and the Court determined that local officials were unresponsive to blacks because of a fear of political backlash. Most certainly, the political climate in West Helena was proven to be more accessible and more responsive to the needs of its black citizens.

The only instances in which this Court has declared at-large voting schemes unconstitutional has been in *White v.*

Regester, 412 U.S. 755 (1972) and *Rogers v. Lodge*, No. 80-2100 (Decided July 1, 1982). Appellants submit however, that the principles advanced in *White* and *Rogers* would necessitate an affirmance of the District Courts approval of the at-large electoral system adopted in West Helena. In *White*, the multimember districts of Dallas and Bexar County, Texas were held unconstitutional because "the political process leading to nomination and election were not equally open to participation . . . " *Id.* at 766. The political process was not "equally open to participation" because (1) a slating organization was unresponsive to blacks, (2) racial campaign tactics had been utilized, (3) a majority vote requirement existed and (4) because minorities had been hindered in their efforts to register. These facts stand in sharp contrast to the accessibility to the political process which exists in West Helena. In West Helena, candidates are required to win only a plurality of votes and not a majority as in Dallas County. West Helena has no slating organizations and racial tactics have never been utilized. Lastly, West Helena has experienced moves by the election commission and by blacks themselves to register all eligible voters.

In *Rogers*, this Court reaffirmed the principles advanced in *White* and held that an at-large electoral scheme will be held unconstitutional only if there is evidence "that blacks have less opportunity to participate in the political process and to elect candidates of their choice." *Rogers v. Lodge*, No. 80-2100, slip op. at 11 (July 1, 1982). The at-large voting system in *Rogers* was determined to have excluded blacks from the political process because (1) blacks were effectively prevented from patricipating in Democratic Party affairs, (2) there were property ownership requirements which made it difficult for blacks to hold certain county offices, (3) no blacks had ever been elected in the county, (4) a majority vote was required, and (5) the candidates had no residuary requirements. Appellants urge that the factors which lead this Court to conclude that blacks were excluded from the political process in *Rogers* are not present in West Helena. Candidates in West Helena face no barriers from political parties or other similar

organizations. Candidates must merely pay a nominal filing fee and obtain ten signatures on a petition to be eligible to run for office. Unlike the plaintiffs in *Rogers*, the black citizens in West Helena have successfully run and been elected to the City Council. As noted earlier, two blacks were nominated to sit on the Council as well. Candidates in West Helena must run for a Council position in the subdistrict from which they reside, and they need only achieve a plurality of the votes. After analyzing the extent of black participation in the political process, the District Court held:

> Citizens of West Helena register and vote in municipal elections for the candidates of their choice without hindrance and no group is denied access to the political system.
>
> . . .
>
> The evidence was not persuasive that the at-large method of aldermanic elections has been retained because of a desire to perpetuate racial discrimination.

514 F. Supp. at 781. Appellants urge that the Eighth Circuit erred in reversing the above factual findings of the District Court. In *Rogers* this Court concluded "that we were not inclined to overturn the District Court's factual findings, 'representing as they do a blend of history and an intensely local appraisal of the design and impact of the [county's] multi-member district in light of past and present reality, political and otherwise'." *Rogers v. Lodge*, No. 80-2100, slip op. at 9 (July 1, 1982). Appellants submit that the decision of the Eighth Circuit which held that the at-large voting system of West Helena is unconstitutional is irreconcilable with the decisions in *Bolden*, *White*, *Whitcomb* and *Rogers*, and thus this Court should note probable jurisdiction of this appeal.

CONCLUSION

Upon these facts and for these reasons the Appellants respectfully pray that this Court note probable jurisdiction of this appeal.

Respectfully submitted,

RALPH C. MURRAY
CITY ATTORNEY
115 North Sebastian Street
Box 2397
West Helena, Arkansas 72390
(501) 572-3722

and

BYRON FREELAND
MITCHELL, WILLIAMS & SELIG
1000 Savers Federal Building
Capitol Avenue at Spring Street
Little Rock, Arkansas 72201
(501) 376-3151

Attorneys for Appellants

Byron Freeland

CERTIFICATE OF SERVICE

I, Byron Freeland, do hereby certify that a copy of the foregoing Jurisdictional Statement was mailed to the following attorneys of record on this 9th day of July, 1982:

Ms. Janet L. Pulliam
Mr. P.A. Hollingsworth
Hollingsworth & Associates, P.A.
Suite 900
Tower Building
Fourth at Center Streets
Little Rock, Arkansas 72201
ATTORNEYS FOR APPELLEES

Mr. William L. Robinson
Mr. Norman J. Chachkin
Ms. Lezli Baskerville
Lawyers' Committee for Civil Rights
Under Law
733 15th Street N.W.
Suite 520
Washington, D.C. 20005
ATTORNEYS FOR *AMICUS CURIAE*

Byron Freeland

APPENDIX I

Reverend P.L. PERKINS, Phillips County Concerned Citizens, Sam Bennett, John Hamilton, Mrs. Lillie Mae Stevens, Wilson Rodgers, Reverend Julius McGruder, Welton Davis, Reverend C.W. Gilcreast and Orta Bush, Appellants,

v.

CITY OF WEST HELENA, ARKANSAS, Mayor Jesse Porter; City Councilmen Bob Teeter, Dick Cunningham, Tommie Dial, Charles Miles and Dwight Galloway, Appellees.

No. 81-1516.

**United States Court of Appeals,
Eighth Circuit.**

Submitted Nov. 12, 1981.

Decided April 13, 1982.

Class action was instituted challenging city's at-large system of electing aldermen on basis that it denied black citizens their rights under the Fourteenth and Fifteenth Amendments. The United States District Court for the Eastern District of Arkansas, 514 F.Supp. 770, William Ray Overton, J., dismissed the complaint, and plaintiffs appealed. The Court of Appeals, Heaney, Circuit Judge, held that the direct and circumstantial evidence was insufficient to sustain finding that the at-large voting system was maintained for a neutral reason, but, rather, the evidence was sufficient to establish that the at-large system was unconstitutionally maintained for the discriminatory purpose of limiting the opportunity of blacks to participate meaningfully or effectively in the political process and to elect legislators of their choice.

Reversed and remanded.

1. Elections — 12

No group, even if racially identifiable, has a right to elect representatives proportionate to its voting power in the community; however, a vote dilution claim is a cognizable constitutional cause of action under the appropriate circumstances. U.S.C.A.Const.Amend. 15.

2. Constitutional Law — 215.3
Elections — 12

Claim of racially discriminatory vote dilution is cognizable under both Fourteenth and Fifteenth Amendments; focus of such claim is whether minority voters are denied the opportunity to participate effectively in the political process, and not whether they are officially permitted to register and vote under the law. U.S.C.A. Const.Amends. 14, 15.

3. Constitutional Law — 215.3

Claim of racially discriminatory vote dilution is cognizable under Fourteenth Amendement only if discriminatory intent is established; direct evidence of such purpose is entitled to great weight, but circumstantial evidence of discriminatory intent will also suffice. U.S.C.A. Cont.Amend. 14

4. Constitutional Law — 215.3

Claim of racially discriminatory vote dilution will succeed under Fourteenth Amendment only if the at-large electoral system was created or maintained for discriminatory purpose; in determining whether discriminatory purpose existed, district court must consider totality of circumstances to determine whether the at-large electoral system was created or maintained to accord members of the allegedly injured group less opportunity than other voters to participate meaningfully

in the political process and elect legislators of their choice. U.S.C.A.Const.Amend. 14.

5. Elections — 12

Evidence of historical discrimination with regard to voting is relevant to question of invidious intent to extent it affects a minority group's present opportunity to participate effectively in the electoral process. U.S.C.A.Const.Amends. 14, 15.

6. Constitutional Law — 215.3
Municipal Corporations — 80

In action challenging at-large system of electing aldermen in city on basis that such system denied black citizens their rights under Fourteenth and Fifteenth Amendments, direct and circumstantial evidence was insufficient to sustain finding that the at-large voting system was maintained for neutral reasons, but, rather, the evidence was sufficient to establish that the at-large system was unconstitutionally maintained for discriminatory purpose of limiting the opportunity of blacks to participate meaningfully or effectively in the politica. process and to elect legislators of their choice. Voting rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.; U.S.C.A.Const.Amends. 14, 15.

William L. Robinson, Norman J. Chachkin, Lezli Baskerville, Lawyer's Committee for Civ. Rights Under Law, Washington, D.C., for amicus curiae.

Kaplan, Hollingsworth, Brewer & Bilheimer, P.A. Hollingsworth, Janet L. Pulliam, Little Rock, Ark., for appellants.

Ralph C. Murray, City Atty., West Helena, Ark., and Byron Freeland, Mitchell, Williams & Selig, Little Rock, Ark., for appellees.

Steve Clark, Atty. Gen. by R.B. Friedlander, Asst. Atty. Gen., Little Rock, Ark., for State of Ark.

Before HEANEY and McMILLIAN, Circuit Judges, and REGAN,* Senior District Judge.

HEANEY, Circuit Judge.

Plaintiffs appeal from a decision of the United States District Court for the Eastern District of Arkansas, 514 F.Supp. 770, which held that the at-large system of electing aldermen in the City of West Helena, Arkansas, was neither adopted or maintained for the purpose of denying black citizens their rights under the Fourteenth or Fifteenth Amendments to the United States Constitution, or Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. We affirm the district court's finding that at-large voting was not adopted for an unconstitutional or illegal purpose. We reverse, however, its finding that at-large voting was not maintained for an unlawful purpose. We hold that the direct and circumstantial evidence in this case establishes that the defendants have retained West Helena's at-large electoral system to intentionally deprive black voters of their rights in violation of the Fourteenth and Fifteenth Amendments, and the Voting Rights Act of 1965. We remand to the district court with directions to devise a remedy that will fully protect the voting rights of black voters in West Helena.

I. FACTS

The plaintiffs are citizens of the City of West Helena, Arkansas.[1] The population of West Helena is approximately

---

*The Honorable JOHN K. REGAN, United States Senior District Judge, Eastern District of Missouri, sitting by designation.

[1]Not all of the named plaintiffs in this action are residents of West Helena. Some are residents, however, and they are clearly proper parties here.

forty percent black and sixty percent white. Since 1920, the city has been governed by a council consisting of eight aldermen. It is divided into four wards for the purpose of electing aldermen. The ward lines have not changed since 1920. The white residents and black residents generally live separate and apart from each other. Wards 2 and 3 are entirely white. Parts of Wards 1 and 4 are also white. The other parts of Wards 1 and 4 are "black wards" separated from the white areas by a railroad track. There is a large disparity in the population of the wards. Wards 2 and 3 contain only twenty-seven percent of the city's population, while seventy-three percent of the population reside in Wards 1 and 4.

Candidates for aldermanic positions must reside in the ward from which they seek to be elected. There are two positions in each ward, and each candidate is required to specify the "seat" or "post" for which he or she is running within the ward of his or her residence. All candidates then run for election on an at-large basis. The entire electorate is required to vote for two candidates from each ward. Single-shot voting is effectively prohibited under Arkansas law. Candidates, however, must only receive a plurality of votes cast to win an election, and there are no runoffs. Histroically, West Helen's municipal elections have been characterized by "bloc voting" polarized along racial lines.

Under this electoral scheme, no black has ever been elected in a "head-to-head" contest against a white candidate. Only three black candidates have ever been elected to the city council, and in each case, the black candidate ran against at least two white candidates. Moreover, when these black incumbents stood for reelection, each was opposed by only one white candidate; and, in each instance, the black was defeated.

The record establishes that West Helena's municipal government has been unresponsive to the needs of black citizens, and blacks have been denied equal access to public

housing, municipal boards and commissions, municipal employment and city services. Since at least 1977, blacks have petitioned the council members to be more responsive to the black community and to change the electoral system from at-large elections to elections by ward. Few changes have been made in response to black demands and the requests for ward elections have been rejected.

On October 20, 1978, a group of black "concerned citizens" instituted this action to enjoin the continued use of at-large elections for city aldermen in West Helena. They alleged that the at-large election scheme was adopted and has been maintained for the purpose of diluting black voting strength[2] in violation of the Fourteenth and Fifteenth Amendments, and section 2 of the Voting Rights Act. They additionally contended that the population in the four city wards is not substantially equal as required by Arkansas law, and they sought to have the district court exercise its pendent jurisdiction to reapportion the wards.

After trial, the district court held that the plaintiffs failed to establish their Fourteenth Amendment claim because they did not prove that the defendants created or maintained West Helena's at-large electoral system for a discriminatory purpose. It also held that the plaintiffs did not have a valid Fifteenth Amendment or Voting Rights Act

---

[2]Vote dilution occurs when an at-large election plan is used to cancel out the voting strength of a substantial minority population. Typically, a relatively small geographic area of a municipality will be occupied by a minority group which would constitute a majority or near majority of a single election district if an election-by-district voting system was used instead of an at-large scheme. That minority group would then be able to elect representatives of its choice for that district. Under an at-large system, however, where the majority of voters in the municipality is white, the minority group's voting power will be overcome by the citywide strength of white voters. Thus, minorities do not elect any representative notwithstanding the group's geographical concentration. *See Nevett v. Sides*, 571 F.2d 209, 216 (5th Cir. 1978); Comment, *City of Mobile v. Bolden: A Setback in the Fight Against Discrimination*, 47 Brooklyn L.Rev. 169, 172 & n.9 (1980).

claim because blacks were free to register and to vote in West Helena. Finally, the district court declined to exercise its pendent jurisdiction to address the issue of disparate ward populations. The plaintiffs appeal from these decisions.

II. DISCUSSION.

A. Introduction.

The Constitution of the United States protects the right of all citizens to vote and to have their votes counted. *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S.Ct. 1362, 1377, 12 L.Ed.2d 506 (1964).[3] Indeed, the Supreme Court has recognized that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, *supra*, 377 U.S. 554, 84 S.Ct. at 1377. Moreover, because "right to exercise the franchise in a free and unimpaired manner is preserative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 560, 84 S.Ct. at 1380.

[1] At-large voting is not *per se* unconsitutional. *E.g.*, *City of Mobile v. Bolden*, 446 U.S. 55, 57, 100 S.Ct. 1490, 1494, 64 L.Ed.2d 47 (1980); *White v. Regester*, 412 U.S. 755, 765, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314 (1973). No group, even if racially identifiable, has a right to elect representatives proportionate to its voting power in the community. *City of Mobile v. Bolden*, *supra*, 446 U.S. at 79, 100 S.Ct. at 1506; *Whitcomb v. Chavis*, 403 U.S. 124, 149, 91 S.Ct. 1858, 1872, 29 L.Ed.2d 363 (1971). Nonetheless, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by

---

[3] *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), extended the standards of *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), to local governments.

wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims, supra*, 377 U.S. at 555, 84 S.Ct. at 1378. Thus, a vote dilution claim is a cognizable constitutional cause of action under the appropriate circumstances. *City of Mobile v. Bolden, supra*, 446 U.S. at 65-66, 100 S.Ct. at 1498-99; *White v. Regester, supra*, 412 U.S. at 765-766, 93 S.Ct. at 2339; *Leadership Roundtable v. City of Little Rock*, 661 F.2d 701 (8th Cir. 1981); *Lodge v. Buxton*, 639 F.2d 1358, 1363 (5th Cir. 1981).

B. City of Mobile v. Bolden.

To determine whether the plaintiffs have established their vote dilution claim, we begin with the Supreme Court's decision in *City of Mobile v. Bolden, supra*, 446 U.S. 55, 58, 100 S.Ct. 1490, 1495, 64 L.Ed.2d 47 (1980). In *Bolden*, the Supreme Court reversed a decision of the Fifth Circuit Court of Appeals which had held that Mobile's at-large system of electing city council members discriminated against black voters in violation of the Fourteenth and Fifteenth Amendments. *Id.* at 67, 100 S.Ct. at 1499. The standards established in *Bolden*, however, are difficult to discern because no view of the justices commanded a clear majority, and six separate opinions were published.

Justice Stewart, writing for the plurality,[4] found that the Fifteenth Amendment is violated only by purposeful discrimination that *directly* interferes with the rights of blacks to register and to vote. He concluded that "[h]aving found that Negroes in Mobile, 'register and vote without hindrance,' the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of [the Fifteenth] Amendment in the present case." *Id.* at 65, 100 S.Ct. at 1498.

---

[4]Justice Stewart, was joined in the plurality opinion by Chief Justice Burger and Justices Powell and Rehnquist in *City of Mobile v. Bolden*, 446 U.S. 55, 58, 100 S.Ct. 1490, 1495, 64 L.Ed.2d 47 (1980).

With respect to the Fourteenth Amendment, Justice Stewart wrote that to establish a claim of unconstitutional vote dilution, "it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. A plaintiff must prove that the disputed plan was 'conceived or operated as [a] purposeful device to further racial * * * discrimination.' " *Id.* at 66, 100 S.Ct. 1499 (footnote omitted). The plurality then found that the evidence of purposeful discrimination was insufficient to prove a Fourteenth Amendment violation. *Id.* at 72-74, 100 S.Ct. at 1503.

Justice Stevens concurred in the judgment. he agreed with the plurality that no constitutional violation had been established, but he relied on an alternative test. *Id.* at 90-94, 100 S.Ct. at 1512-14 (Stevens, J., concurring in judgment). He stated that "a proper test should focus on the objective effects of the political decision rather than the subjective motivation of the decision-maker." *Id.* at 90, 100 S.Ct. at 1512. Under this test, the appropriate inquiry is whether the election scheme

> (1) * * * was manifestly not the product of a routine or a traditional political decision; (2) * * * had a significant adverse impact on a minority group; and (3) * * * was unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority.

Id. at 90, 100 S.Ct. at 1512.

Justice Stevens concluded that a vote dilution claim is cognizable under both the Fourteenth and Fifteenth Amendments. *Id.* at 84, 100 S.Ct. at 1509.

Justice Blackmun agreed with Justice White's dissenting opinion which concluded that the plaintiffs had proven purposeful discrimination, and that both the Fourteenth and Fifteenth Amendments could be violated by

the vote dilution. *Id.* at 80, 100 S.Ct. at 1507 (Blackmun, J., concurring in result). Justice Blackmun, however, concurred in the result reached by the plurality because he found that the district court's remedy was "not commensurate with the sound exercise of judicial discretion." *Id.* at 80, 100 S.Ct. at 1507. He objected to the order requiring Mobile to totally replace its seventy-year-old commission form of government with a mayor-council system. *Id.* at 82, 100 S.Ct. at 1508.

In separate dissents, Justices Bernnan, White and Marshall each concluded that the plaintiffs had established that the votes of blacks were unconstitutionally diluted by Mobile's purposeful discrimination. *Id.* at 94, 103, 136-139, 100 S.Ct. at 1514, 1518, 1537-39 (Brennan, White, Marshall, JJ., dissenting). Moreover, Justices Brennan and Marshall said that proof of discriminatory impact alone was sufficient to support a constitutional claim. *Id.* at 94, 104, 100 S.Ct. at 1514, 1520. Finally, Justices Marshall and White stated that a vote dilution challenge is a valid Fifteenth Amendment as well as Fourteenth Amendment, claim. *Id.* at 103, 126, 100 S.Ct. at 1518, 1532.

C. The Law after Bolden.

[2] A threshold question involves the constitutional basis of a vote dilution claim. There is no doubt—even after *Bolden*—that a plaintiff bringing a vote dilution claim may challenge an electoral system on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment. *E.g., Lodge v. Buxton, supra,* 639 F.2d at 1372; *Leadership Roundtable v. City of Little Rock,* 499 F.Supp. 579, 583-584 (E.D. Ark. 1980), *aff'd,* 661 F.2d 701 (8th Cir. 1981). The district court properly recognized this fact.

Plaintiff's claim of racially discriminatory vote dilution is also cognizable under the Fifteenth Amendment.[5] *Washington v. Finlay*, 644 F.2d 913, 919 (4th Cir. 1981); *Lodge v. Buxton*, *supra*, 639 F.2d at 1373; *United States v. Uvalde Consolidated Independent School District*, 625 F.2d 547, 552 (5th Cir. 1980), *cert. denied*, 451 U.S. 1002, 101 S.Ct. 2341, 68 L.Ed.2d 858 (1981). *But see McMillan v. Escambia County, Florida*, 638 F.2d 1239, 1242 (5th Cir.), *cert. dismissed*, ___ U.S. ___, 102 S.Ct. 17, 71 L.Ed.2d ___ (1981). Although the four members of the *Bolden* plurality concluded that the Fifteenth Amendment only prohibits official action denying blacks the right to register and vote, *City of Mobile v. Bolden*, *supra*, 446 U.S. at 64-65, 100 S.Ct. at 1498-99; a majority of the Court apparently concluded that the Fifteenth Amendment protects more than this mechanical right. Five justices indicated that the Fifteenth Amendment also protects against vote dilution that limits the effective—not merely technical—access of blacks to the political process. *See id.* at 80, 84, 94, 103, 126-129, 100 S.Ct. at 1506, 1509, 1514, 1518, 1532-1534

---

[5]The plaintiffs also challenge West Helena's at-large voting scheme under Section 2 of the Voting Rights Act, 42 U.S.C. §§ 1971, 1973. Although the exact reach of Section 2 has not yet been resolved, it is clear that the section at least is coterminous with the Fifteenth Amendment. *Washington v. Finlay*, *supra*, 664 F.2d at 927; *Kirksey v. City of Jackson*, 663 F.2d 659, 665 (5th Cir. 1981). Therefore, because we conclude in this case that the defendants engaged in purposeful discrimination in violation of the Fifteenth Amendment, they have also violated Section 2 of the Voting Rights Act. We need not reach plaintiffs' contention that a showing of discriminatory impact alone is sufficient to establish a Section 2 violation.

(Blackmun, J., concurring in result); (Stevens, J., concurring in judgment); (Brennan, White and Marshall, JJ., dissenting).[6]

Therefore, the district court erred as a matter of law when it dismissed the plaintiffs' Fifteenth Amendment claim on the ground that:

> Justice Stewart's [plurality] opinion makes clear that the Fifteenth Amendment imposes only one limitation on the states: "It forbids them to discriminate against Negroes in matters having to do with voting." 446 U.S. at 61, 100 S.Ct. at 1496. The parties' stipulation in the instant case that all registered voters in West Helena can vote for the candidate of their choice from those electing to be candidates for municipal office is conclusive as to plaintiffs' claim under the Fifteenth Amendment. See *Mobile, supra*, 446 U.S. at 65, 100 S.Ct. at 1498.

---

[6]While Justices Brennan and Blackmun did not expressly state their views on the issue, we gather from the opinions as a whole that they agreed with Justices Stevens, White and Marshall that a vote dilution claim is a proper Fifteenth Amendment cause of action. Moreover, we are convinced that the Fifteenth Amendment is not so narrowly circumscribed as to protect only against direct official barriers that prevent blacks from registering and voting. Mere access to the ballot does not insure that minorities will be accorded the opportunity to participate effectively in the political process. Note, *The Supreme Court, 1979 Term*, 94 Harv.L.Rev. 77, 144 (1980). When an at-large electoral system dilutes the voting strength of a minority group, the minority voters are denied a fair opportunity to influence the choice of representatives. *Id.* at 144. The right to vote them becomes a futile and meaningless exercise. *E.g., City of Mobile v. Bolden, supra*, 446 U.S. at 84-86, 126-129, 100 S.Ct. at 1509-10, 1532-34 (Stevens, J., concurring in judgment; Marshall, J., dissenting); Note, *The Supreme Court, 1979 Term, supra*, 94 Harv.L.Rev. at 144. The Supreme Court has repeatedly found that the Fifteenth Amendment guarantees not only the right to register and vote, but also the right to participate effectively and meaningfully in the electoral process. *See, e.g., White v. Regester*, 415 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); and cases cited in note 7, *infra*. *Also see* Note, *Voter Dilution and New Intent Requirements Under the Fifteenth and Fourteenth Amendments;* 18 Hous.L.Rev. 611, 614 & n.29 (1981).

The focus of a vote dilution claim under the Fifteenth Amendment, like such a claim under the Fourteenth Amendment, is whether minority voters are denied the opportunity to participate effectively in the political process—not whether they are offically permitted to register and vote under the law.[7] *E.g., Lodge v. Buxton, supra*, 639 F.2d at 1362. *See City of Mobile v. Bolden, supra*, 446 U.S. at 65, 100 S.Ct. at 1498 (plurality opinion) (Fifteenth Amendment not violated because blacks "register and vote *without hindrance.*" [emphasis added]).

[3] The next issue is whether discriminatory intent must be proven to establish a claim of unconstitutional vote dilution. Under the Fourteenth Amendment, it is clear that a vote dilution claim is cognizable only if such intent is established. *Washington v. Finlay, supra*, 664 F.2d at 919; *Lodge v. Buxton, supra*, 639 F.2d at 1363; *Leadership*

---

[7] Arkansas passed an Election Code in 1891 to begin the process of disenfranchising blacks. In 1895, the legislature established a poll tax. In 1906, the Democratic Party adopted a "white primary." Blacks were not permitted to vote in the Democratic Party primary until *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944), and the poll tax remained in effect until the passage of the Voting Rights Act in 1965. From 1965 until the date of trial, despite changes in the law, impediments were still placed in the path of blacks wishing to register, and it was often difficult for them to vote because the black polling places were often inconvenient and overcrowded. The case was not tried below, however, on the theory that these impediments standing alone were sufficient to constitute a violation of the Fifteenth Amendment and we will not decide it on that theory here. We note, however, that the Supreme Court has interpreted the Fifteenth Amendment as providing protection to the entire electoral franchise, and not just the official right to register and vote. *See, e.g., Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed2d 512 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed2d 110 (1960); *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); *United States v. Saylor*, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341 (1944); *Smith v. Allwright, supra*. *Also see* Note, *City of Mobile v. Bolden: Voter Dilution and New Intent Requirements Under the Fifteenth and Fourteenth Amendments, supra*, 18 Hous.L.Rev. at 614 & n.29. Moreover, we will consider these impediments as probative of the question of whether the at-large voting scheme was maintained for a discriminatory purpose in analyzing plaintiffs' vote dilution theory.

Roundtable v. City of Little Rock, supra, 499 F.Supp. at 592, *aff'd*, 661 F.2d at 701. A Fifteenth Amendment violation may also be established by such a showing of purposeful discrimination.[8] *Washington v. Finlay, supra*, 664 F.2d at 919; *Lodge v. Buxton, supra*, 639 F.2d at 1375.

The Supreme Court in *Bolden* left unanswered the question of what evidence is necessary to establish proof of discriminatory purpose. Direct evidence of such purpose is obviously entitled to great weight. There is such direct evidence here. Moreover, circumstantial evidence of discriminatory intent will also suffice. *City of Mobile v. Bolden, supra*, 446 U.S. at 73, 101-103, 100 S.Ct. at 1503,

---

[8] We need not reach the question of whether a Fifteenth Amendment vote dilution cause of action may also be established by a showing of discriminatory impact alone because of our conclusion that the plaintiffs proved intentional discrimination in this case. We note, however, that only the four justices in the *Bolden* plurality clearly concluded the discriminatory intent was a requirement for a Fifteenth Amendment cause of action. Justices Marshall and Brennan stated in *Bolden* that a showing of discriminatory impact alone is sufficient to establish a Fifteenth Amendment violation. Justices White and Blackmun did not expressly indicate whether they believed that proof of discriminatory purpose was necessary for a Fifteenth Amendment violation. Justice Stevens, relying on his objective standard, concluded that intent was not a relevant inquiry in vote dilution cases. Prior Supreme Court decisions in other voting contexts do not establish whether a showing of discriminatory purpose is a prerequisite to a Fifteenth Amendment cause of action. *See* note 7, *supra*. *Also see City of Mobile v. Bolden, supra*, 446 U.S. at 126-135, 100 S.Ct. at 1532-36 (Marshall, J., dissenting). Thus, we believe that the question of whether discriminatory intent must be shown to establish a Fifteenth Amendment vote dilution claim is an open one. *But see, e.g., Lodge v. Buxton*, 639 F.2d 1358 (5th Cir. 1981); *Washington v. Finlay, supra*, 664 F.2d at 919 (concluding that discriminatory intent is a necessary element of a Fifteenth Amendment claim).

1517-19; *Lodge v. Buxton, supra*, 639 F.2d at 1363.[9] The precise nature and extent of the evidence necessary to establish discriminatory intent is, however, fraught with ambiguity after *Bolden*. While four Justices were satisfied with the Fifth Circuit's so-called *Zimmer* criteria,[10] *City of Mobile v. Bolden, supra*, 446 U.S. at 80, 94, 101-102, 135 n.33, 100 S.Ct. at 1506, 1514, 1518-19, 1537 n.33 (Blackmun, J., concurring in result; Brennan, White, Marshall, JJ., dissenting), four justices rejected these factors as being conclusive of discriminatory purpose. Id. at 72-73, 100 S.Ct.

---

[9]Indeed, it is obvious that requiring a plaintiff to produce direct evidence would often be an insurmountable burden because public officials rarely, if ever, leave behind a well-documented record of their illicit motives, *Lodge v. Buxton, supra*, 639 F.2d at 1373; Note, *Discriminatory Purposes and Discriminatory Impact: An Assessment After Feeney*, 79 Colum.L.Rev. 1376, 1404 (1979).

[10]The Fifth Circuit in *Bolden* relied on the test it developed in *Zimmer v. McKeither*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds*, 424 U.S. 63, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1975), to find that Mobile's at-large election system was unconstitutional. In *Zimmer*, the Fifth Circuit held that a multi-member electoral system was unconstitutional because it was maintained to dilute the voting strength of minority voters. The Court identified a list of factors that should be considered in evaluating a vote dilution claim. It said:

> where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particular interest, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting povisions and the lack of provisions for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in *White v. Regester, supra*, demonstrates, however, that all these factors need not be proved in order to obtain relief.

Id. at 1305.

at 1503 (plurality opinion.) Justice Stevens rejected the use of the *Zimmer* criteria to draw an inference of intent because he concluded that the question of intent is not relevant to the disposition of vote dilution cases.[11] *Id.* at 90, 100 S.Ct. at 1512.

After reviewing the various *Bolden* opinions, the Fifth Circuit in *Lodge v. Buxton, supra*, 639 F.2d at 1373, stated:

> We conclude that [the Supreme Court in *Bolden*] rejected the use of the *Zimmer* criteria to the extent that this Court, in *Bolden* presumed the existence of a discriminatory purpose from the proof of some of those factors. We believe the Court rejected the use of such a quantitative weighing approach, requiring instead an independent inquiry into intent. Additionally, we think the Supreme Court was directing all courts making the inquiry to apply the *Zimmer* criteria only to the extent that they are relevant to the factual context at hand and, to the extent they are not so relevant, to employ other criteria. Finally, it appears that the Supreme Court has somewhat increased the burden of proof on plaintiffs in such cases. [Emphasis included.]

We agree with the Fifth Circuit. The *Zimmer* criteria, to the extent that they are relevant, may be used to determine whether a discriminatory purpose can be inferred. Not only were four justices satisfied in *Bolden* that the Court of Appeals had correctly relied on the *Zimmer* criteria to infer an invidious intent, the plurality conceded that the *Zimmer* factors "may afford some evidence of discriminatory purpose." *City of Mobile v. Bolden, supra*, 446 U.S. at 73, 100 S.Ct. at 1503. Moreover, the *Zimmer* factors are plainly derived from the Supreme Court's decisions in *White v. Regester, supra*, 412 U.S. at

---

[11] We conclude that because Justice Stevens' test for unconstitutional dilution is so substantially different than that employed by the other justices, his view must simply be counted as uncertain when determining what is the proper standard for finding discriminatory intent. *Accord, Washington v. Finlay, supra*, 664 F.2d at 919 n.4.

766-769, 93 S.Ct. at 2339-2341, and *Whitcomb v. Chavis*, *supra*, 403 U.S. at 143-149, 91 S.Ct. at 1869-1872. *See City of Mobile v. Bolden*, *supra*, 446 U.S. at 101, 100 S.Ct. at 1517 (White, J., dissenting); Note, *City of Mobile v. Bolden*: A Setback in the Fight Against Discrimination, Brooklyn L.Rev. at 190-192. And all of the *Bolden* opinions expressly reaffirmed the continuing vitality of the vote dilution principles of *White* and *Whitcomb*.

The absence or presence of some, or all, of the *Zimmer* factors, however, is not conclusive of the discriminatory purpose issue. *Lodge v. Buxton*, *supra*, 639 F.2d at 1373-1375. The plurality clearly believed that the exclusive use of the *Zimmer* criteria was "inconsistent with [the Supreme Court's] decisions in *Washington v. Davis* [426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597] and *Arlington Heights [v. Metropolitan Housing Development Corp.]*." *City of Mobile v. Bolden*, *supra*, 446 U.S. at 73, 100 S.Ct. at 1503 (citations omitted). Thus, to the extent that they are relevant, the factors articulated in *Arlington Heights v. Metropolitan Development Housing Corp.*, *surpra*, 429 U.S. 252, at 266-268, 97 S.Ct. 555 at 564-565, 50 L.Ed.2d 450, also should be employed to determine whether a discriminatory purpose can be inferred in a particular case. *See McMillan v. Escambia County, Florida*, *supra*, 638 F.2d at 1243. *See generally* Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeney*, 79 Colum.L.Rev. 1376 (1979). These factors include discriminatory impact, historical background, specific events leading up to the challenged decision, departures from the normal procedural sequence, substantive departures from the normal decision-making process, legislative or administrative history, and any other direct or circumstantial evidence relevant to intent. *Arlington Heights v. Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 266-268, 97 S.Ct. at 564-565 (1977).

[4] To summarize, a vote-dilution claim will succeed under the Fourteenth Amendment only if the at-large

electoral system was created or maintained for a discriminatory purpose. In determining whether a discriminatory purpose existed, no set of factors, including those suggested in *Zimmer* and *Arlington Heights*, is dispositive of the question of intent. Instead, all factors must be considered to the extent that they are relevant to the question of intent. Moreover, even if all of the *Zimmer* and *Arlington Heights* factors are established, an inference of discriminatory intent is not necessarily to be drawn. The district court must consider the totality of circumstances to determine whether the at-large electoral system was created or maintained to accord the members of the allegedly injured group less opportunity than other voters to participate meaningfully in the political process and elect legislators to their choice.

D. The Present Case.

To determine whether the district court erred in finding that the defendants here did not engage in purposeful discrimination, we must examine its factual finding and conclusions of law in light of all relevant facts and circumstances under the standards we articulated above.

1. *Minority Access to the Political Process.*

The district court drew the express legal conclusion that "[c]itizens of West Helena register and vote in municipal electins for the candidate of their choice without hindrance and no group is denied access to the political process." We cannot agree.

The district court based its conclusion primarily on the parties' stipulation that "all registered voters residing in West Helena, Arkansas, can vote for the candidate of their choice from those selecting to be a candidate for municipal office." The court also found that blacks have engaged in voter registration drives with some success and that blacks

have served as election judges at polling places. These specific factual findings are not clearly erroneous. Nonetheless, they are not sufficient to support the court's legal conclusion in view of the additional factual findings by the district court and other evidence in the record.

The district court found that impediments to blacks voting and registering still exist at present. Specifically, it found that "such factors as illiteracy, feelings of inferiority by some because of their occupations, apprehension on the part of welfare recipients about the possible consequences of their active participation in the election consequences and an attitude that their vote will not be significant has kept some blacks from registering and voting" and that "polling places in some of the black voting areas are not ideal and may discourage some voters."

The district court determined that black candidates cannot campaign effectively in white areas of West Helena because of deep-rooted racial discrimination. Moreover, the record reveals that black candidates have been denied the opportunity to speak to all-white service and business groups during campaigns, but that white candidates have been permitted to address these organizations. The plaintiffs emphasize, in particular, the activites of the West Helena Promotional Association, a group of white business and civic leaders. The district court found that the Association was not engaged in any formal or concerted political activity. In our view, the record supports this finding only insofar as it relates to formal political activities. The record also shows that the Association gave financial and organizational support to the candidacy of the present white mayor in the 1978 election, and that it informally supported other white candidates for the city council in other recent elections.

The district court found that blacks traditionally have been excluded from almost all city boards and commissions. While the district court noted that there has been some

inprovement since about 1975, it found that blacks are still underrepresented on municipal boards and commissions in proportin to their population.

The impediments to registering and voting, inability to campaign effectively in white areas and before white service and business groups, and underrepresentation on municipal boards and commissions, all are evidence of the fact that blacks in West Helena cannot participate meaningfully in the political process. *Lodge v. Buxton, supra*, 639 F.2d at 1379. In particular, the evidence of *present* interference with the rights of blacks to register and vote is significant given the plurality position in *Bolden* that the Fifteenth Amendment is violated only by acts directly impinging upon the right to register and vote. *Id.* at 1377 & n.38. Consequently, we cannot agree with the district court's conclusion that black citizens of West Helena can register and vote for candidates of their choice *without hindrance* and that they are not denied access to the political process. The fact is that impediments to registering and voting are placed in the way of blacks and that they have been denied the opportunity to participate fully in West Helena's political process.

2. *Responsiveness of Elected Officials to Minority Interests.*

The district court concluded that the city council conducts open meetings accessible to blacks to voice their grievances. It further found, however, that "the Council has often failed to act favorably on their requests." Moreover, the city council, despite its authority to redraw ward boundaries, has not acceded to the requests of blacks to redistrict West Helena.

Furthermore, the district court found that blacks either have no representation or are grossly underrepresented on city commissions, and as employees of

the police, fire and water departments. The first black was admitted to the police department in 1970, and no blacks were on the fire squad until 1978. Moreover, the municipal services received by blacks are generally inferior to those provided for whites. For example, some black areas of the city have no street paving, inadequate drainage, inadequate and poorly maintained park facilities and, in some areas, no sewer or water service.[12] Public housing in West Helena remained segregated until 1979. Schools remained segregated until 1970.

An expenditure of federal grants targeted for a specific purpose is hardly sufficient to refute plaintiffs' evidence that West Helena's municipal government has neglected the needs of the blacks.

The district court's findings of fact are amply supported by the evidence in this case. The record establishes that the West Helena city council has continuously failed to "voluntarily" respond to the needs and concerns of blacks, despite their direct appeals. Absent such drastic measures as demonstrations, protest or lawsuits, the council has not responded affirmatively to the legitimate concerns of black citizens. The evidence is clear that, in the past, the municipal government in West Helena has been unresponsive to the needs and concerns of black citizens, *and* that such unresponsiveness continues today. Such unresponsiveness is probative of a finding that the at-

---

[12]The defendants argue that the city recently has made significant expenditures for capital improvements in the black residential areas. While there is some evidence that this contention is true, we note that the district court observed that:

> [a]lthough no specific figures are available from the evidence, the Court has the impression that a substantial portion of the expenditures for capital improvements in the black residential areas has been money from federal grant funds. The City has not qualified for some grant funds because it did not have an affimative action plan which met the standards required by H.U.D. An affirmative action plan for the city was not adopted until June, 1980. [Footnote omitted.]

large system is being maintained for a discriminatory purpose. *Washington v. Finlay, supra*, 664 F.2d at 919-921; *Lodge v. Buxton, supra*, 639 F.2d at 1374-1375.

3. *History of Discrimination.*

[5] The plurality in *Bolden* observed that "past discrimination cannot, in the manner of orginal sin, condemn action that is not in itself unlawful." *City of Mobile v. Bolden, supra*, 446 U.S. at 74, 100 S.Ct. at 1503. Nonetheless, evidence of historical discrimination is relevant to the question of invidious intent to the extent it affects a minority group's *present* opportunity to participate effectively in the electoral process. *Lodge v. Buxton, supra*, 639 F.2d at 1358. *See Arlington Heights v. Metropolitan Housing Development Corp., supra*, 429 U.S. at 267, 97 S.Ct. at 564; *White v. Regester, supra*, 412 U.S. at 766-767, 93 S.Ct. at 2339.

The district court found that West Helena has a long history of invidious discrimination in the election process. After reconstruction, Arkansas, along with other southern states, began to pass a series of acts to disenfranchise blacks. For example, in 1891, Arkansas passed the Election Code to begin restricting the right of blacks to vote. In 1895, the legislature continued the disenfranchisement of blacks with the passage of the poll tax. By 1906, blacks had been nearly totally disenfranchised in Arkansas. In the event that any blacks retained the right to vote, the Democratic Party created a "whites only" primary. Blacks were not allowed to vote in the Democratic primary until *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944), and poll taxes were levied until 1965 when the Voting Rights Act was passed.

Moreover, this past discrimination has reduced the present opportunity of blacks to participate in the political process. The record shows that the effects of these

discriminatory election laws has been to discourage some blacks from exercising their right to vote today. 514 F.Supp. at 774. Similarly, past discrimination has contributed to socio-economic depression among blacks. The district court found that "[o]n average, the whites have significantly more years of formal education, less unemployment, more income and better housing." The district court further found that this socio-economic depression has discouraged some blacks from participating in the political process. *Id.* at 774. Moreover, past discrimination also has contributed to the underrepresentation of blacks on the city council and municipal boards and commissions which the district court found. *Id.* at 775. These factual findings are not clearly erroneous, and they are evidence of the fact that the at-large electoral system in West Helena has been maintained for a discriminatory purpose. *Lodge v. Buxton, supra,* 639 F.2d at 1377-1378.[13]

4. *Mechanics of Voting System.*

West Helena's at-large scheme does not have a majority vote requirement. As the district court found, this fact decreases the likelihood that West Helena's electoral system is being maintained for a discriminatory purpose. *E.g., City of Mobile v. Bolden, supra,* 446 U.S. at 101, 111, 100 S.Ct. at 1518, 1523 (White and Marshall, JJ., dissenting); *Nevett v. Sides,* 571 F.2d 209, 271 (5th Cir. 1978), *cert. denied,* 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980).

---

[13]The defendants argue that because West Helena adopted its at-large system in 1920, when blacks were totally disenfranchised, the city could have no racial motivation in selecting or retaining its voting scheme. For the reasons set forth in the text, we conclude that West Helena's adoption of its at-large voting plan during a time the state was enacting a series of laws to disenfranchise blacks is probative of a finding that the electoral system has been maintained for a discriminatory purpose. However, we agree with the district court that the plaintiffs have failed to prove that the at-large voting scheme was adopted for a discriminatory purpose.

On the other hand, West Helena's electoral system requires that candidates reside in the ward which they seek to represent, provides that candidates must run for a particular numbered "seat" or "post" within a ward, and effectively prohibits single-shot voting. These provisions, particularly when combined with racially polarized voting, significantly enhance the possibility that West Helena's election scheme is being maintained for a discriminatory purpose. *E.g., Lodge v. Buxton, supra,* 639 F.2d at 1380.

Of particular importance are the anti-single-shot voting provisions. Federal courts have repeatedly emphasized the importance of single-shot voting as a means of amelio-rating the vote-diluting consequences of at-large elections. *E.g., City of Rome v. United States,* 446 U.S. 156, 183-185 & nn. 19 & 21, 100 S.Ct. 1548, 1565-1566 & nn. 19 & 21, 64 L.Ed2d 119 (1980); *White v. Regester, supra,* 412 U.S. at 766, 93 S.Ct. at 2339; *Thomasville Branch of the NAACP v. Thomas Cunty, Georgia,* 639 F.2d 1384, 1385 (5th Cir. 1981); *Nevett v. sides, supra,* 571 F.2d at 223. Single-shot voting enables a minority group to win some at-large seats by concentrating the votes of its members behind a limited number of candidates while the vote of the majority is dividing among a number of candidates.[14] *E.g., City of Rome v. United States, supra,* 446 U.S. at 183 n.19, 100 S.Ct. at 1565 n.19.

---

[14] Justice Marshall described single-shot voting and its effect in *City of Rome v. United States,* 446 U.S. 156, 184 n.19, 100 S.Ct. 1548, 1566, n.19, 64 L.Ed.2d 119 (1980):

> Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates." U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206-207 (1975).

Several provisions of Arkansas law frustrate single-shot voting by the black citizens of West Helena. Ark.Stat.Ann. § 19-1002.7 requires that when a first-class city with a mayor-council form of government chooses to elect aldermen at-large, as the City of West Helena has done, candidates must reside in the ward from which they seek election. Moreover, Ark.Stat.Ann. § 19-1002.6 requires that aldermanic candidates designate the "seat" or "post" (No. 1 or No. 2) they are seeking when they file as a candidate. Finally, Ark.Stat.Ann. § 19-1004 provides for staggered terms for each of the two aldermen running from each ward. Thus, the system does not operate in practice as it might appear from the non-majority vote provision emphasized by the district court. Rather than having a field of candidates with plurality winners—in which single-shot voting might result in minority representation—these provisions of Arkansas law may operate to separate one contest into a number of contests, thereby increasing the likelihood of "head-to-head" races and frustrating single-shot voting. *City of Rome v. United States, supra*, 446 U.S. at 185 & n.21, 100 S.Ct. at 1566 & n.21. The district court failed to note the effect of these anti-single-shot voting provisions on plurality vote requirements.

5. *Discriminatory Impact.*

While the Constitution does not guarantee every racial group elected representation in proportion to its members, *City of Mobile v. Bolden, supra*, 446 U.S. at 79, 100 S.Ct. at 1506 (plurality opinion), significant deviation from proportionate representation is indicative of discriminatory intent. *Id.* at 70, 100 S.Ct. at 1501 (plurality opinion), and 101, 122-123, 100 S.Ct. at 1517, 1529-1530 (White and Marshall, JJ., dissenting). *See Arlington Heights v. Metropolitan Housing Development Corp. supra*, 429 U.S. 266, 97 S.Ct. at 563; *Washington v.*

Davis, 426 U.S. 229, 242, 96 S.Ct. 2040, 2049, 48 L.Ed.2d 597 (1976). Blacks have been significantly underrepresented on the West Helena city council. Blacks constitute forty percent of the population of West Helena. Yet, at the time this case was tried, there was only one black alderman in West Helena. Since 1917, there have only been three black aldermen. In 1976, there were two blacks on the council, more than at any time previously or since then. Each of these successful black candidates, however, ran against two whites. When the blacks stood for reelection, each was opposed by one white candidate, and the incumbents were not reelected.

Racial bloc voting prevails in West Helena. Almost without exception, black candidates have received more than ninety percent of the vote in the identifiable "black voting areas" and only between fifteen and twenty-four percent of the vote in "white voting areas." With election by wards, blacks could possibly elect representatives from two of the city's wards. At-large voting, however, has made it virtually impossible for the residents of the two "black wards" to elect representatives from their neighborhoods.

6. *Specific Sequence of Events.*

In November, 1977, after blacks had instituted a boycott of white businesses and petitioned the council to change to ward elections, the city council voted four-to-three to draft an ordinance that would provide for the election of aldermen by wards. The proposed ordinance was to be presented for consideration at the next council meeting. Thereafter, the city attorney expressed the view that under Arkansas law, a majority of five votes was required to draft such an ordinance. The city council has not voted on the issue again.

It is significant that the city attorney did not state his view until after the council had voted to draft a proposal to change to elections by ward. Moreover, the opinion was

given despite the fact that L.T. Simes, a black alderman, explicitly stated at the November 29th council meeting that he had been assured by the county clerk that a majority vote was not required to prepare the proposed ordinance. Finally, no copy of a written opinion by the city attorney was introduced into evidence and no authority for the view was cited to this Court or the district court.

The timing of the city attorney's opinion and subsequent failure of the council to re-vote on changing to ward election evinces a discriminatory purpose. The specific sequence of events leading up to a decision and departures from the normal procedural process such as occurred here are evidence of a discriminatory purpose. *See Arlington Heights v. Metropolitan Housing Corp., supra*, 429 U.S. at 268, 97 S.Ct. at 564-565.

7. *Legislative and Administrative History—Direct Evidence.*

The legislative or administrative history is relevant to the issue of discriminatory intent, especially where, as here, there are contemporary statements of members of the decisionmaking body. *Arlington Heights v. Metropolitan Housing Development Corp., supra*, 429 U.S. at 268, 97 S.Ct. at 565.

Based on testimony at trial, the district court reached a specific legal conclusion that evidence showed that "the City had retained the present system primarily because of a belief that at-large elections best serve the interest of the city as a whole. Ward elections, it is believed, would result in the accentuation of 'local' interest at the expense of the common needs of the general population." We find little support in the record for this conclusion and, therefore, reject it.

At trial, Mayor Teeter suggested that at-large voting encouraged aldermen to place citywide interests before the concerns of the wards in which they lived. Yet, not one of

the three aldermen opposing the motion to draft a proposed ordinance to change to ward election at the November 29, 1977, council meeting advanced this theory for retaining at-large elections. Two of the aldermen simply said that the issue should be submitted to a vote of the citizens. In this regard, it should be remembered that sixty percent of the population of the city is white. The third, J.R. Cunningham, flatly stated, "I do not think you would have fair representation as far as white people are concerned with the four wards." Indeed, on this record, the aldermen would have been hardpressed to claim that they opposed a change in election systems because they did not want local concerns to predominate over citywide interests. The evidence shows that the white aldermen, irrespective of their residence, consistently put the interests of the white wards first.

The testimony at trial of a white alderman further demonstrates that the city council maintained the at-large election scheme for a discriminatory purpose. Watson Light testified that he opposed election by ward because black voters predominate his ward and they would not elect him to represent them:

Q. Do you have any reasons why you want it to remain [at-large elections]?

A. Yes, I do.

Q. What are your reasons?

A. I couldn't be elected if it was changed.

Q. Why couldn't you be elected?

A. Because there's more black people that live in the ward that I live in than white people. And if the blacks vote as a block, as they normally do, then I could never be elected. I'd be precluding myself from being on the Council. And I couldn't vote that way.

Q. Don't whites vote as a block, too?

A. Usually, usually.

Q. So, by your theory then, that precluded black people from getting elected?

A. It could be construed as that.

The direct evidence of discriminatory intent contained in the statements of Aldermen Cunningham and Simes convince us that the district court erred in reaching the legal conclusion that the defendants maintained at-large voting to advance citywide interests. Not one single alderman advanced the "citywide" interest rationale for retaining at-large voting at the November 29, 1977, council meeting. Indeed, the only support for the district court's conclusion is the after-the-fact testimony given by Mayor Teeter at trial.[15] This tesimony is not sufficient to sustain the district court's conclusion in light of the direct contemporary evidence of discriminatory intent contained in the statements of Alderman Cunningham, which are corroborated by the direct evidence of Alderman Simes at trial. Moreover, the circumstantial evidence also supports the inference that the defendants acted with an invidious intent in retaining West Helena's at-large electoral system.

The testimony of two of West Helena's white aldermen does not necessarily "condemn" the city's at-large voting scheme. It is, however, an important fact, in the totality of facts and circumstances, tending to prove that the at-large electoral system was maintained for a discriminatory purpose. *McMillan v. Escambia County, Florida, supra*, 638 F.2d at 1247-1248. Moreover, this direct evidence of

---

[15] The district court, citing the minutes of the November 29, 1977, council meeting, found that then Mayor Jessie Porter also opposed the resolution regarding elections by ward because they would tend to promote local concerns at the expense of citywide interests. The minutes of that meeting do not support the district court's finding.

discriminatory intentions of two of West Helena's aldermen distinguishes this case from *Bolden*. In *Bolden*, the only direct evidence of invidious intent was contained in the statements of state legislators from Mobile who were not parties to the case. *See City of Mobile v. Bolden*, *supra*, 446 U.S. at 72-74 & nn. 21 & 22, 100 S.Ct. at 1503 & nn. 21 & 22 (plurality opinion). In contrast, here the direct evidence of intentional discrimination is contained in the explicit statements of the officals who are directly responsible for maintaining West Helena's at-large voting system and who have rejected requests to change the voting plan to elections by ward.

8. *Ward Size Disparity.*

The populations of the wards in West Helena are disparate, even though state law requires that ward size be "substantially equal." Ark.Stat. § 19-1002.7. Seventy-three percent of West Helena's population reside in its two predominantly black wards. Only twenty-seven percent of the city's population live in the two all-white wards. The wards have not been redistricted since they were adopted in 1920 despite population changes. This disparity in ward size, coupled with the requirement that the aldermen reside in the wards from which they are elected, results in disproportionate underrepresentation for the residents of the two "black" wards. Yet, despite the foregoing state statute, repeated Supreme Court decisions emphasizing the importance of the "one person—one vote" principle, *e.g.*, *Reynolds v. Sims*, *supra*, 377 U.S. at 533, 84 S.Ct. at 1362, 12 L.Ed.2d 506, and requests by blacks for redistricting, the city council has refused to reapportion West Helena's wards to insure proportionate representation for the citizens of the two "black" wards. This evidence is probative of a

finding that West Helena's at-large system is being maintained for a discriminatory purpose.[16]

We do not agree that a vote in one ward has as much weight as a vote in any other ward. While the representation problems here are not as clear-cut as in the classic reapportionment cases, the "one man, one vote" principle, *e.g., Reynolds v. Simes, supra*, 377 U.S. 533, 84 S.Ct. at 1362, 12 L.Ed.2d 506, still has implications for at-large systems such as the one used by West Helena. To the extent that the concilmen from any particular ward act to protect and promote the interests of the citizens of their ward, residents of the larger wards have less proportional representation than voters in the less populated wards. And the fact that West Helena's at-large system has candidates run from wards and requires that the councilmen be residents of the wards that they represent, creates a strong likelihood that the councilmen will have some sense that they are representing the interests of their ward—not just the city as a whole—even though they are elected by the entire electorate.

9. *Balance of Interests.*

Finally, we address the district court's conclusions that the "City of West Helena and its citizenry has a substantial interest in maintaining the present system of at-large elections" and that the city retained at-large elections for this neutral reason.

In reaching these conclusions, the district court balanced the discriminatory effect of West Helena's at-large voting scheme against the city's interest in maintaining its election system. Such a balancing of the parties' competing interests is an appropriate factor to consider in determining whether an inference of invidious intent can be drawn from the evidence in a vote dilution case. *See* Note, *The Supreme Court, 1979 Term*, 94 Harv.L.Rev. 75, 147-148 (1980); Note,

---

[16] The district court stated:

> it is questionable that reapportionment cases, such as *Baker v. Carr*, 369 U.S. 186 [82 S.Ct. 691, 7 L.Ed.2d 663] (1962), would condemn the unequal wards in West Helena since all aldermen are elected city-wide. A vote in one ward has as much weight in a city-wide election as does a vote in any other ward.

Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeney, supra, 79 Colum.L.Rev. at 1407-1412.[17] We cannot agree with the district court that West Helena has maintained its present electoral system for neutral reasons.

In the balancing process, we determine the discriminatory impact by considering both the extent to which the harm is shared with those who are not members of the minority group and the importance of the individual

---

[17]The Supreme Court's recent decisions in *Personnel Administrator v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979); and *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979), suggest that in determining whether or not a discriminatory intent can be inferred from circumstantial evidence, an important consideration is the balance between the governmental interest advanced in favor of the challenged action and the discriminatory impact caused by the action. A recent analysis of the Supreme Court's standards for determining discriminatory purpose in light of these cases commented:

> The realistic and practical application of the discriminatory purpose requirement necessitates that courts, in weighing objective evidence, engage in a balancing process designed to determine the *plausibility* that a disputed policy was adopted without the contamination of suspect considerations. In particular, courts should be willing to weigh the extent and severity of the disproportionate effects of a challenged policy against the importance of its "legitimate" purposes to the *legislators or administrators* involved, to determine the plausibility that the legislators or administrators relied solely on "neutral" considerations in adopting the challenged policy.

Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeney, supra*, 79 Colum.L.Rev. at 1408 (emphasis included).

The commentators in Note, *The Supreme Court, 1979 Term, supra*, 94 Harv.L.Rev. at 147-143, concluded that this same balancing process should be used in determining whether or not discriminatory intent can be inferred in a vote dilution case.

interest implicated. Note, *The Supreme Court, 1979 Term supra*, 94 Harv.L.Rev. at 147-148. Here, the vote diluting impact of West Helena's at-large system is borne nearly solely by blacks.[18] The individual interest involved is the crucial interest in the right to vote. The Supreme Court has recognized that "each and every citizen has an unalienable right to full and effective participation in the political precesses." *Reynolds v. Sims, supra*, 377 U.S. at 565, 84 S.Ct. at 1383. Moreover, the right to vote is particularly important because it is the cornerstone for upholding other basic political and civil rights. *Id.* at 561, 84 S.Ct. at 1381. But here, the opportunity of West Helena's black citizens to exercise this right effectively has been significantly limited by the at-large voting plan maintained by the defendants. *Id.* at 774-775.

Against this substantial adverse impact caused by the at-large voting system must be weighed West Helena's interest in retaining its electoral scheme. The at-large voting scheme is optional under Arkansas law. Thus, there is no strong state policy favoring at-large voting in municipal elections. *See Lodge v. Buxton, supra*, 639 F.2d at 1379. Nonetheless, the defendants assert that they have maintained the at-large scheme to prevent local interests from predominating over citywide concerns on the city council. This interest, as the district court found, is legitimate. *See City of Mobile v. Bolden, supra*, 446 U.S. at 81, 92-93, 100 S.Ct. at 1507, 1513 (Blackmun and Stevens, JJ., concurring). The direct evidence, however, establishes that the defendants retained at-large elections not to promote citywide interests, but rather to protect the white incumbents on the council. *Id.* at 779-780.

Accordingly, we find that the record does not support the district court's legal conclusion that the evidence is

[18] To the extent that the harm here consists of underrepresentation caused by the disparity in ward sizes, the white residents of the city's two large wards are effected as well as black voters. These two large wards, however, have predominately black voters.

more persuasive that the at-large voting system was maintained for a neutral reason rather than for a discriminatory purpose. The balance between the competing interests of the parties clearly supports an inference that the defendants here acted with discriminatory intent.

E. CONCLUSION.

[6] The district court found that West Helena's at-large electoral system was neither created nor maintained for a discriminatory purpose. After carefully reviewing the record and briefs, and hearing oral argument, we believe that the district court's finding that the plaintiffs did not prove discriminatory intent is clearly erroneous. On the basis of the direct and circumstantial evidence in this case, we hold that the at-large system in West Helena was unconstitutionally maintained for the discriminatory purpose of limiting the opportunity of blacks to participate meaningfully or effecively in the political process and to elect legislators of their choice.

The record here shows that each of the factors relevant to the issue of intent raises the inference that West Helena's at-large voting system was maintained for a discriminatory purpose. Moreover, and of particular importance, there is direct evidence that the at-large electoral system was retained to prevent white altermen from losing their seats to black candidates. Such direct evidence of invidious intent, so rarely available, must be given great weight in answering the question of whether a defendant acted with a discriminatory purpose. At-large voting plans have been adopted by many municipalities throughout the nation, and they can serve legitimate governmental purposes. But the evidence does not support a finding that the West Helena plan was retained to further such interests.

In sum, we conclude that the plaintiffs have established that West Helena's election system violates the Fourteenth and Fifteenth Amendments of the United States Constitution, and section 2 of the Voting Rights Act of 1965. The district court's dismissal of plaintiff's claims, therefore, is reversed. We remand the case to the district court to fashion appropriate relief for these violations consistent with this opinion.

Lastly, we turn to plaintiff's contention that the district court erred in refusing to exercise its pendant jurisdiction to redraw West Helena's ward boundaries. The plaintiffs claim that the present wards are not substantially equal in size as required by Arkansas law. Ark.Stat.Ann. § 19-1002.7. The district court declined to reach the issues presented by the disparity in ward sizes. Rather, it held that plaintiffs must pursue the streamlined redistricting remedy provided by Ark.Stat.Ann. § 19-1005 which is available in a state court proceeding. In light of our disposition of this case, the district court should reconsider this issue on remand.

APPENDIX II

514 FEDERAL SUPPLEMENT

ORDER

Now, this 8th day of April 1981, the following are ordered:

(1) O'Callaghan's claim for injunctive relief is dismissed as moot;

(2) the defendants are granted summary judgment in all other respects; and,

(3) the Clerk of Court shall close the case file.

Reverend P.L. PERKINS, Phillips County Concerned Citizens, Sam Bennett, John Hamilton, Mrs. Lillie Mae Stevenson, Wilson Rodgers, Reverend Julius McGruder, Welton Davis, Reverend C. W. Gilcreast and Orta Bush, Plaintiffs,

v.

CITY OF WEST HELENA, ARKANSAS, Mayor Jesse Porter, City Councilmen, Bob Teeter, Dick Cunningham, Tommie Dial, Charles Miles and Dwight Galloway, Defendants.

No. H C 78 44.

United States District Court,
E.D. Arkansas, E.D.

April 10, 1981.

Class action was instituted for alleged violation of Fourteenth and Fifteenth Amendment rights. The District Court, Overton, J., held that: (1) procedural requirement that election of city council members be on an "at large" basis was

not violative of rights of members of plaintiffs' class to equal protection given evidence that requirement was not uncouth or offensive, but a product of a traditional political decision and, though it was not clear that requirement had a significant impact on minorities, particularly in light of suggested alternative, which would likely assure blacks of permanent minority representation on city council with majority of white council members having no accountability to black population, requirement was not totally irrational and was supported by neutral justifications, and (2) the city's election procedure requiring election of city council members on a "vote at large" basis was not violative of the Fifteenth Amendment where all registered voters in city could vote for candidate of their choice from those electing to be candidates for municipal office.

Complaint dismissed, and relief denied.

1. Elections — 12

A citizen's right to vote can be denied by debasement or dilution of the weight of the citizen's vote just as effectively as by a flat prohibition of free exercise of the franchise. U.S.C.A. Const. Amend. 14.

2. Constitutional Law — 225.3 (4)

Multimember districts in a legislative apportionment scheme are not unconstitutional, but under the circumstances of a particular case, a multimember constituency scheme might operate to minimize or cancel out the voting strength of a discreet and insular political minority. U.S.C.A. Const. Amend. 14.

3. Elections — 12

Fifteenth Amendment imposes only one limitation on the states and that is that they not discriminate against blacks in matters having to do with voting. U.S.C.A. Const. Amend. 15.

4. Municipal Corporations — 80

The city's election procedure requiring election of city council members on a "vote at large" basis was not violative of the Fifteenth Amendment where all registered voters in city could vote for the candidate of their choice from those electing to be candidates for municipal office. U.S.C.A. Const. Amend. 15.

5. Municipal Corporations — 80

Protection afforded by the Voting Rights Act was coterminous with the Fifteenth Amendment and, hence, added nothing to claim that city's election procedure requiring election of city council members on an "at large" basis was violative of rights of plaintiffs' class. Voting Rights Act of 1965, §2, 42 U.S.C.A. §1973; U.S.C.A. Const. Amend. 15.

6. Constitutional Law — 215.3, 225.3 (5)

To establish a violation of Fourteenth Amendment by a legislative apportionment that invidiously minimizes or cancels out voting potential of racial or ethnic minorities, plaintiff must not only show that group allegedly discriminated against is not elected representatives in proportion to its numbers, but must also show that disputed claim was conceived or operated as a purposeful device to further racial discrimination. U.S.C.A. Const. Amend. 14.

7. Constitutional Law — 215.3, 225.3 (5)

Ultimate question in determining whether a legislative apportionment scheme operates to invidiously minimize or cancel out voting potential of racial or ethnic minorities is not whether there has been a history of discrimination, but whether a discriminatory motive has been proven in the case in question. U.S.C.A. Const. Amend. 14.

8. Constitutional Law — 215.3

Procedural requirement that election of city council members be on an "at large" basis was not violative of rights of members of plaintiffs' class to equal protection given evidence that requirement was not uncouth or offensive, but a product of a traditional political decision and, though it was not clear that requirement had a significant impact on minorities, particularly in light of suggested alternative, which would likely assure blacks of permanent minority representation on city council with majority of white council members having no accountability to black population, requirement was not totally irrational and was supported by neutral justifications. Ark. Stats. §§19-1002.5, 19-1002.7; U.S.C.A. Const. Amend. 14.

9. Constitutional Law — 225.3 (5)

Test for cases alleging gerrymandering or vote dilution requires a consideration of whether districting configuration chosen was uncouth, that is to say, was manifestly not a product of a routine or traditional political decision, whether scheme had a significant adverse impact on a minority group, and whether scheme was unsupported by a neutral justification and, thus, was either totally irrational or entirely motivated by a desire to curtail political strength of minority. U.S.C.A. Const. Amend. 14.

10. Courts — 489 (1)

Issues presented by a claim that the existing wards of the city were not substantially equal in size as required by Arkansas law were required to be resolved in a proceeding before the state court rather than the federal court given the novel and streamlined procedure in Arkansas law whereby 100 citizens of a city could petition the circuit court of a county in which the city was located for an order appointing a commission to redraw the lines of unequal wards. Ark. Stats. §§19-1002.7, 19-1005.

P.A. Hollingsworth, Perlesta A. Hollingsworth, P.A., Little Rock, Ark., for plaintiffs.

Ralph C. Murray, City Atty., West Helena, Ark., for defendants.

OPINION AND ORDER

OVERTON, District Judge.

This is a class action suit pursuant to 42 U.S.C. §1983 in which the plaintiffs [1] seek to represent all black registered voters of the City of West Helena. It is contended that the city's election procedure which requires election of city council members on an "at large" basis violates the Fourteenth and Fifteenth Amendment rights of the class. In addition to a declaration that the current election procedure is unconstitutional, plaintiffs ask that the Court compel the implementation of elections by single member districts to insure constitutionally fair representation in city government.

Plaintiffs amended their complaint to further allege that the City of West Helena engaged in a practice of denying blacks an opportunity to fully exercise their right to vote in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973. Additionally, plaintiffs contend that the population in the four city wards is not "substantially equal" as required by Ark. Stat. Ann. §19-1002.7 and alleged the Court has pendent jurisdiction to direct the correction of the inequality.

---

[1] Although this case was filed as a class action claim, no motion for class certification was filed nor was there any action taken on the class allegations. Reverend P.L. Perkins, Sam Bennett, John Hamilton, Reverend Julius McGruder and Welton Davis are not residents of the City of West Helena and have not demonstrated any basis for concluding they are proper parties to the lawsuit. The legal status of the "Phillips County Concerned Citizens" is unclear. The Court concludes that Mrs. Lillie Mae Stevenson, Wilson Rodgers, Reverend C. W. Gilcreast and Orta Bush are proper parties plaintiff and that there is no need to reach any additional conclusion with respect to the status of the parties.

The State of Arkansas intervened for the purpose of defending the facial constitutionality of Ark. Stat. Ann. §19-1002 *et seq.*, the statutes which authorize the election procedure employed by the City of West Helena.

The Court has jurisdiction of the case by reason of 28 U.S.C. §2201 and 28 U.S.C. §1343 (3).

The parties entered into the following pre-trial stipulation which is incorporated as part of these findings and conclusions:

1. The City of West Helena, Arkansas, is classified as a city of the first class under the laws of the State of Arkansas.

2. The City of West Helena, Arkansas, was incorporated on May 23, 1917.

3. The City of West Helena, Arkansas, became a city of the first class on January 15, 1920.

4. The City of West Helena, Arkansas, was divided into four (4) wards with the boundary lines separating the four (4) wards remaining the same since becoming a city of the first class in 1920.

5. The present at-large method of electing aldermen for the City of West Helena, Arkansas, has been the same since the City of West Helena, Arkansas, became a city of the first class in 1920.

6. The method of electing aldermen for the City of West Helena, Arkansas, is one of the methods permitted by Ark. Stat. Ann. §§19-1002.5 and 19-1002.7. (Repl. 1980). This statute provides for a total of eight (8) aldermen with two (2) being elected from each ward.

7. That pursuant to Ark. Stat. Ann. §19-1002.7 (Repl. 1980), candidates for the office of alderman shall reside in the

ward from which they seek to be elected and, under the chosen method, shall run at large.

8. That at the time of filing this cause of action there were eight (8) elected aldermen in the City of West Helena, Arkansas, with six of those so elected being white and two (2) of those so elected being black. There were:

Ward 1: Bob Teeter – white
Ernest Simpson – black
Ward 2: Dwight Galloway – white
Vernon Joyner – white
Ward 3: Thomas L. Dial – white
Charles Miles – white
Ward 4: J.R. Cunningham – white
L.T. Simes – black

9. That at this time there are eight (8) aldermen in the City of West Helena, Arkansas, and that those eight (8) are as follows:

Ward 1: Watson Light – white
Ernest Simpson – black
Ward 2: Walter Morris – white
Dwight Galloway – white
Ward 3: Durwood Montgomery – white
Bruce King – white
Ward 4: Harold Smith – white
E.F. Kalb, Jr. – white

10. That the mayor in and for the City of West Helena, Arkansas, at this time is R.E. "Bob" Teeter.

11. That voter registration records do not reflect race.

12. All registered voters residing in West Helena, Arkansas, can vote for the candidate of their choice from those so electing to be a candidate for a municipal office.

13. At the time of the filing of this cause of action, P.L. Perkins, Sam Bennett, John Hamilton, Julius McGruder and Welton Davis were not residents of the City of West Helena, Arkansas.

14. That at the time of the filing of this cause of action, there was in effect in the State of Arkansas Ark. Stat. Ann. §19-1002.5 (Repl. 1980), which provides:

> "On the Tuesday following the first Monday in November, 1966, and every two (2) years thereafter the qualified voters of all cities of [the] first class with less than fifty thousand (50,000) inhabitants having the Mayor-Council form of government shall elect two (2) Aldermen from each ward for a term of two (2) years. The election officials shall designate the Aldermen as Alderman No. One (1) and Alderman No. Two (2)."

15. That at the time of the filing of this cause of action, there was in effect in the State of Arkansas Ark. Stat. Ann. §19-1002.7 (Repl. 1980), which provides:

> "Candidates for the office of Alderman in cities of the first class shall reside in the ward from which they seek to be elected, and shall run at large, and all of the qualified electors of such cities shall be entitled to vote in such election.
>
> Provision shall be made by the election commissioners in any such cities so that the qualified electors of each ward shall have at least one (1) voting precinct in each ward where the resident electors thereof may cast their ballot.
>
> Provided, however, that the city council of any city is empowered and authorized to provide by ordinance that all aldermen be elected by ward, in which event each alderman shall be voted upon by the qualified electors of the ward from which such person is a candidate, and when so provided by city ordinance the name of such candidate shall appear upon the ballot

only in the ward in which he is a candidate. Provided, further, that all such cities choosing to elect aldermen by ward shall provide, in the manner provided by law, for the establishment of wards of substantially equal population in order that each alderman, or aldermen, elected from each ward shall represent substantially the same number of people in the city."

16. Plaintiff, Lillie Mae Stevenson, Wilson Rodgers, and Orta Bush, are black citizens of the United States, residents of Phillips County.

17. Since the city was incorporated, there have only been three black city councilmen.

18. In 1978, three black candidates ran for city council, no black candidate was successful.

19. The 1970 census estimates that the total population of West Helena is 11,005. Of this total 59.6% (6,564) are white and 40.4% (4,441) are black.

20. In the State of Arkansas Negroes were first allowed to vote by Article 1 §3 of the Constitution of 1868.

21. That a poll tax was assessed as a requirement for voting in Arkansas until 1965, and was repealed by Amendment 51 §17 of the Arkansas Constitution.

22. In 1970 the first private non-parochial school in the City of West Helena was formed.

23. The State of Arkansas has no legislative policy which prefers at-large elections.

Background

Arkansas and the City of West Helena, by implementation of Arkansas election laws, have a long history of racial discrimination in the election process. [2]

The passage of the Voting Rights Act in 1965 and the abolition of the poll tax that same year removed the last of the legal impediments to blacks voting in Arkansas.

The City of West Helena is divided into 4 wards. The eastern boundary of the city borders the corporate limits of the City of Helena. The principal portion of West Helena's growth has necessarily been to the west with lesser growth to the north and south. The city's existing ward lines were drawn when the current system of municipal government was adopted in 1920. They have never been changed. Because residential housing is essentially segregated, the voters in Wards 2 and 3, which are the two eastermost wards, are almost all white voters. The portions of Wards 1 and 4 (1A, 4A, 4A3 and 4C) which are contiguous to Wards 2 and 3 are predominantly white. Wards 1B and 4B are an identifiable black residential area separated from the other wards by a railroad siding track and the voters are almost exclusively black.

Since the ward lines have not changed since 1920 and the growth has been to the west, a significant disparity has developed in the population in each ward. The 1970 census

---

[2] Plaintiffs' exhibits 30, 31, 32, 33 and 34 provide some examples evidencing this historical fact. Plaintiff's exhibit 38, which is received in evidence over defendants' objections, accurately reflects the methods of disenfranchisement employed over the years.

comparative population figures are shown in the following chart: [3]

Ward	Population	% of Total
1	3,765	35%
2	1,011	9%
3	2,103	18%
4	4,214	38%

Although by national standards neither the white nor black residents of West Helena fare well with respect to years of education, employment, income and housing, there exists a significant disparity between blacks and whites. On average, the whites have significantly more years of formal education, less unemployment, more income and better housing. [4]

Between 1966 and 1978, blacks have been candidates for city alderman on 12 occasions. Any registered voter may become a candidate for alderman by getting 10 signatures on a petition. (Testimony of Lillie Mae Stevenson.) DeWitt Jordan, a black, ran in 1968, 1970 and 1972. He was apparently elected on one occasion, but the evidence is not clear when he was elected or if he was defeated for re-election. In 1976, 2 blacks were elected to the City Council. In each instance when a black was elected, he ran against two whites and was elected by a plurality of the vote. When the blacks stood for re-election, only one white ran against each black incumbent and each black was defeated. Almost without exception, the black candidates have gotten in excess of 90% of the vote in the wards which are identifiable "black voting areas" and between 15% and 24% of the votes in the identifiable "white voting areas". [5]

---

[3] See also, plaintiffs' exhibits 3 and 3A.

[4] See generally plaintiffs' exhibit 5 at page 16 and plaintiffs' exhibit 8.

[5] For the specific results see plaintiffs' exhibit 1. The Court concludes that plaintiffs' characterization of black voting areas and non-black voting areas as reflected on exhibit 1 are generally accurate.

Blacks can campaign in predominately white areas of the city although it is difficult for black candidates to reach white voters. (Testimony of Lillie Mae Stevenson and Ernest Simpson, Jr.) By the same token, whites campaign in black voting areas but without success when running against a black candidate. (Testimony of Watson Light.) The difficulty is not the result of any policy or practice of the City of West Helena or any organized civic group.[6]

For the last few years, blacks have actively participated in the election process in West Helena. Blacks have engaged in voter registration drives with some success although such factors as illiteracy, feelings of inferiority by some because of their occupations, apprehension on the part of welfare recipients about the possible consequences of their active participation in the election process and an attitude that their vote will not be significant has kept some blacks from registering and voting. The County Election Commission has sent voter registration people to the black community in an effort to register blacks. (Testimony of Lillie Mae Stevenson and Georgia Thornton.)

Blacks serve as election judges at polling places in both black and white voting areas. Candidates, under Arkansas law, are given the right to select "poll watchers" at all polling places so black candidates can select representatives who are authorized to monitor the voting process.

Polling places in some of the black voting areas are not ideal and may discourage some voters. These places are, however, selected by the Phillips County Election Commission and not the City of West Helena. Furthermore, the polling

---

[6]Plaintiffs contend the all white West Helena Promotional Association, a group of business and civic leaders, is an organization which promotes white candidates for City Council to the exclusion of black candidates. The evidence is not persuasive that the Association engages in any formal or concerted political activity.

places are usually chosen on the basis of what building is available within the precinct and not the result of deliberate choice on the part of the commission. (Testimony of Lillie Mae Stevenson and Georgia Thornton.)

The black vote in West Helena is significant and is sought after by candidates. (Testimony by several witnesses.)

Historically, blacks have had no representation or have been under-represented on city commissions and as employees of the police, fire and water departments.[7]

Blacks have long felt that city government in West Helena was unresponsive to their needs. Their concerns have principally centered around their belief that police brutality was directed toward blacks, lack of street paving and inadequate drainage in black residential areas, inadequate and poorly maintained park facilities, lack of representation or under-representation on the City Council and city commissions, failure to provide sewer and water service to some black residential areas and city expenditures for such things as golf courses at times essential services were denied black residential areas.

The black community has used several methods to present their grievances. In 1969, following an incident when a black died while in the custody of the city police, the black community instituted a boycott of white businesses. As previously mentioned, voter registration drives were initiated and blacks sought positions on the City Council. Blacks regularly attend City Council meetings and present grievances. In 1978, another boycott of white businesses was conducted. Lawsuits involving police brutality and public housing assignments have been pursued. Particularly pertinent to this case is the fact that petitions seeking a change in the method of electing aldermen have been presented to and acted upon by the City Council.

Those efforts described have, over the years, produced varying degrees of responsiveness from the City of West Helena.

Identifiable Problem Areas

1. Recreation Facilities

A five member City Park Commission created in 1965 supervises the operation of municipal recreational facilities. At least two blacks, Charles Mills and Marcus Wiley, have served on the Commission.

There are two city parks owned and operated by the City of West Helena. One park is located in the eastern section of town and is used exclusively by whites. It was developed first. The West Helena Junion Auxiliary and the Jaycees furnish the playground equipment at the park. An all white baseball league uses the baseball facilities at the park. All of the improvements in connection with the baseball park have been made by the volunteer baseball association which leases the baseball facility from the city. Two CETA workers assigned by Phillips County have worked at the park at times although it is difficult to determine from the evidence the nature and extent of their involvement in park maintenance and, in particular, the construction or maintenance of the baseball facility. The CETA workers are supervised by the Superintendent of the all white Twin City Baseball League which permits an inference that a significant amount of their time is probably spent working on the baseball facilities for the all white baseball league. The park in the eastern section which could be described as the "white park" is well maintained and accessible. At least some of the maintenance is provided by volunteers.

---

[7] Plaintiffs' exhibit 39, responses to interrogatories.

The other park, which is located in the western section of the city and may be described as the "black park" since it is used only by the black community, is inaccessible, poorly located and poorly maintained.[8]

As a result of the 1978 boycott, the "black park" was cleaned up. (Testimony of Lillie Mae Stevenson.) A lighted baseball field was constructed by the City Park Commission. Because of poor location, it is difficult to police the park and vandals have stolen the copper wire from the electrical lighting system, and shot out the lights. Basketball goals have been erected five or six times but they have been stolen. No significant volunteer work is done on the 'black park". (Testimony of William Waddell.)

The Park Commission is investigating the possibility of relocating the "black park" so that it is more accessible and easier to police.

Expenditures for the two parks by the city for the three years (1976, 1977 and 1978) preceding the filing of this suit were as follows:

East (white) Park	$11,807.00
West (black) Park	$12,800.00[9]

The city owns and operates tennis courts which are located in the white residential area. The property was donated by a civic organization and the courts were constructed with grant funds. Blacks as well as whites use the tennis courts.

---

[8]Plaintiffs' exhibits 12, 13, 17, 21 and 26. Also, testimony of Bankston Waters and Lillie Mae Stevenson.

[9]Defendants' exhibit #5.

The Park Commission also developed and supervises a golf course which is located outside the city limits on airport property. The Commission members, with the help of the National Guard engineers, built the course and a golf professional has been hired to maintain the course. Some blacks use the golf course.

2. Public Housing

The Housing Authority of the city of West Helena administered the operation of the low income public housing projects in the city. The Housing Authority has five members, one of whom is black and was appointed in 1975. In 1979, the Housing Authority, in response to a suit by the United States in behalf of blacks allegedly discriminated against by the Authority in public housing assignments, agreed to a consent decree designed to eliminate discriminatory practices. [10]

The school system in West Helena has been desegrated since 1970. [11]

3. Police Brutality

In 1969, the killing of a black inmate at the City Jail resulted in a boycott of white businesses. Blacks contend that over the years they have been subjected to harassment and brutality at the hands of the West Helena Police Department. Civil litigation by individual blacks has resulted in settlement of claims against city policemen. (Testimony of L.T. Simes.) The police and fire departments are subject to the supervision of the Civil Service Commission which has five members. [12] One black serves on the Commission but he has not effectively

---

[10] Plaintiffs' exhibit #39 (Response to Interrogatory #19) and plaintiffs' exhibit #28.

[11] Testimony of Bankston Waters.

[12] Plaintiffs' exhibit #39 (Response to Interrogatory #19)

voiced the grievances of blacks. As of 1965, no blacks were employed on the city police force. In 1970, four blacks were employed on a force of nineteen. In 1975, there were nine black employees in a department of thirty-three. In September, 1979, the police department had thirty-five employees as follows: [13]

Employees By Race and Sex

White males	—	24
White females	—	1
Black males	—	9
Black females	—	1

Employees By Position

1 police chief	—	White
2 captains	—	1 white, 1 black
1 lieutenant	—	black
4 sergeants	—	white
14 patrolmen	—	12 white, 2 black
1 C I D agent	—	white
9 Auxiliary patrolmen	—	5 white, 4 black
1 radio operator	—	white female
1 typist	—	black female
1 janitor	—	black

There was no specific evidence of instances of alleged police brutality since 1977. There is no basis in the evidence for the conclusion that the city currently condones police brutality directed toward blacks.

4. Streets and Delivery of City Services

The condition of the streets in the black residential areas has been one of the principal sources of complaint by the black community. In 1952 no streets were paved in the black areas

[13] Plaintiffs' exhibit #39 (Response to Interrogatories #5 and #6).

and very few were paved in the white community. (Testimony of Jesse Porter.) Prior to the early 1970's, many of the streets in the black wards remained unpaved, drainage was poor, the ditches were not maintained and holes or cuts made by utility companies were not repaired. Delegations of blacks appeared before the City Council complaining about the condition of the streets. The two black City Council members who were serving on the Council in 1977 and 1978 urged the Council to improve the quality of street paving in the black areas. (Testimony of L.T. Simes and Ernest Simpson, Jr.) Photographs taken in 1977 demonstrate some of the problems which brought about the complaints. [14]

The city initiated a program of street improvement but the quality of the work was not satisfactory. Since 1972, substantially more money has been spent in the predominately black wards (1 and 4) than in the predominately white wards (2 and 3).

The total expenditures per ward from 1972 through 1979 were: [15]

Ward 1	$243,676.53
Ward 2	5,684.00
Ward 3	36,448.25
Ward 4	155,646.29

More expenditures were necessary in the black residential areas because streets "were so bad to start". (Testimony of Lillie Mae Stevenson.)

Two hundred fifty thousand dollars of the listed expenditures were from an Economic Development Administration grant given for improvement of "blighted areas". Most of the grant spent on streets was spent for street paving in the black residential areas.

---

[14] See plaintiffs' exhibits 9, 10, 19, 20, 23 and 28.

[15] See defendants' exhibit #5.

Although no specific figures are available from the evidence, the Court has the impression that a substantial portion of the expenditures for capital improvements in the black residential areas has been money from federal grant funds. The City has not qualified for some grant funds because it did not have an affirmative action plan which met the standards required by H.U.D. [16] An affirmative action plan for the city was not adopted until June, 1980.

In 1978, when Jesse Porter left office as Mayor, all streets in the city had some type of paving.

Apparently the city does not build curbs, gutters or sidewalks. Curbs, gutters and sidewalks are built by improvement districts or, in the case of new residential developments, by the subdivision developers.

Drainage is a problem in black residential areas, but the problem also exists to some extent in all portions of the city.

The Fire Department has one station located in the "middle" of town in Ward 4 and adjacent to Ward 1. The department did not have a black employee until 1978. In September, 1979, there were 14 employees in the department and two were black. The plaintiffs cited one instance when the department failed to respond to a call at a black residence, but the residence was outside the city limits.

Presumably the department adequately services all areas of the city.

Other specific instances of complaints from blacks about delivery of city services to which the Council has not responded are the failure of the city to demolish some burned or unsightly vacant buildings in the black business area, providing police escorts for white funeral directors and not

---

[16] See plaintiffs' exhibit #27.

black funerals, and failure to operate the street sweeper machine in the area of black owned businesses. These matters were called to the Council's attention when Mr. L.T. Simes, a black, was serving as a member of the Council. Apparently the Council took no action on either complaint.

5. Representation on Boards and Commissions and Employment of Blacks in City Departments.

The responses to interrogatories introduced as plaintiffs' exhibit #39 are accepted as factual with respect to appointment to City Boards and Commissions, racial composition of employees in various city departments and applicants (by race) for certain city jobs.

The information contained in the responses generally reflects that in the 1960's blacks were excluded from almost all boards and commissions; that blacks were not employed (nor did they apply) as policemen or firemen; and no black held any position with the city other than menial jobs. Beginning in the early 1970's some blacks were appointed to commissions and blacks were employed in other than menial jobs. Although the figures on appointments and employment reflect improvement, particularly since about 1975, blacks continue to be under-represented in proportion to their population in appointive positions on commissions and employment in a number of departments. [17]

Currently, the situation presents a picture of sharp contrast. The water department has no blacks employed in jobs other than as laborers and the department is supervised by an all white commission. On the other hand, the Mayor's Advisory Council, which has 15 members of relatively recent appointment, is chaired by a black male and is composed of four black males, five black females, three white males and three white females. [18]

---

[17] There is no evidence by which a representative comparison can be made other than the general 60% white to 40% black general population ratio. Given the information regarding education and employment in plaintiffs' exhibit #5, this may not be a satisfactory comparison.

[18] Defendants' exhibit #6.

When two vacancies occured on the City Council in 1980, a black former council member, Ernest Simpson, was appointed to one position. Another black, L.R. Franklin, was nominated and elected by the Council to fill the other position but he declined the appointment. A white was subsequently appointed to fill the position Franklin declined. (Testimony of Watson Light and Ernest Simpson.)

6. Public Access to City Council and Election By Ward

The City Council has a policy of conducting "open" Council meetings and any person who desires to present a grievance or request Council action may do so by attending Council meetings. (Testimony of Bob Teeter and Georgia Thornton.)

Blacks have been heard by the Council on any number of occasions [19] and there is no evidence that any black or group of blacks has been denied the right to present problems before the Council. The Council has frequently failed to act favorably upon requests by blacks [20] but in every instance cited, the grievance or request was acknowledged and discussed. (Testimony of William Waddell and Julia Adkins.)

A pertinent petition by blacks, insofar as this suit is concerned, has been the request for a change in election procedure in order to elect Council members by ward. Aside from official petitions, the Council members are aware that blacks desire ward elections. (Testimony of Watson Light.)

The only occasion when the matter of election by wards was officially acted upon by the City Council occurred in the

---

[19] Plaintiffs' exhibit #39, answer to interrogatory #20, and plaintiffs' exhibits 35, 36, 37 and 40.

[20] See testimony of L.T. Simes in which he reviewed Council minutes from February 5, 1977, through September 5, 1977 (period preceding boycott) regarding presentation of problems which failed to produce favorable Council action.

fall of 1977. At the November 29, 1977 meeting, the Council voted four to three to draft an ordinance which would prescribe election by ward for presentation at the next Council meeting.[21] Thereafter the City Attorney expressed the opinion that under Arkansas law the adoption of a municipal ordinance, resolution or order required a majotiry vote of all elected members of the Council.

At trial some of the present Council members expressed reasons they were opposed to election by ward. Watson Light, a white alderman who resides in Ward 1, testified that he did not want election by ward because black voters predominated in his ward and he could not be elected. He said that blacks in his ward voted "in bloc" and outnumbered the whites. He also testified that city wide the whites outnumber blacks and, because of whites voting "in bloc", a single black candidate could not be elected. Mayor Bob Teeter is opposed to election by ward because of the "local" nature of the alderman's interest as opposed to the "city wide" interest which must be maintained by alderman subject to city wide vote.[22]

Although as previously noted, the wards are not "substantially equal" in population, there apparently has been no petition presented to the Circuit Court of Phillips County requesting that the ward lines be changed to correct the inequality.[23]

---

[21] Plaintiffs' exhibit #37.

[22] The same opinion was expressed by Jessie Porter, Mayor in 1977 when the resolution regarding election by ward was presented. Aldermen Joyner and Teeter, who voted against the resolution in 1977, wanted to submit the issue to the electorate. Alderman Cunningham, the other dissenting voter, expressed the opinion that, "I do not think you would have fair representation as far as white people are concerned with the four wards." (Plaintiffs' exhibit #37)

[23] The procedure for changing ward boundaries to correct population disparities as provided by Arkansas law is discussed *infra* at p. 25.

Legal Background

[1] Claims of denial of the right to suffrage have provided a fertile field for litigation since the Supreme Court's historic decision in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). In *Baker*, the Court held that a claim "under the Equal Protection Clause challenging the constitutionality of a State's apportionment of seats in its legislature, on the ground that the right to vote of certain citizens was effectively impaired since debased and diluted, in effect presented a justiciable controversy subject to adjudication by federal courts." *Reymonds v. Sims*, 377 U.S. 533, 566, 84 S.Ct. 1362, 1384, 12 L.Ed.2d 506 (1964). The theory underlying *Baker* and *Reynolds* is that a citizen's right to vote can be denied by debasement or dilution of the weight of the citizen's vote just as effecitvely as by a flat prohibition of free exercise of the franchise. *Reynolds, supra*, 377 U.S. at 555, 84 S.Ct. at 1378.

[2] It has, however, been held that multi-member districts in a legislative apportionment scheme are not unconstitutional *per se*. *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965). It was, however, recognized that, under the circumstances of a particular case, a multi-member constituency scheme might operate to minimize or cancel out the voting strength of a discreet and insular political minority. *Id.* at 439, 85 S.Ct. at 501.

Claims quite similar to the case at bar were recently the subject of litigation before Chief Judge Eisele of this Court. His thorough and scholarly Memorandum Opinion in *Leadership Roundtable v. City of Little Rock*, 499 F.Supp. 579 (E.D. Ark. 1980), provides as exhaustive a discussion of legal developments in this area as is necessary at the trial court level. The section of his opinion entitled Development of the Law is specifically incorporated herein by reference. As noted in the *Roundtable* opinion, the Supreme Court's most recent voter dilution case is *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). It is primarily in light of the

decision and opinions in *Mobile* that the case at bar must be judged.

The Court notes preliminarily, however, that under the legal standards extant before the *Mobile* case, plaintiffs would be entitled to no relief because they have not demonstrated they have less opportunity than other groups of citizens to participate in the political processes of West Helena. See *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); *Dove v. Moore*, 539 F.2d 1152, 1155; *Leadership Roundtable v. City of Little Rock*, *supra*, 499 F.Supp. at 592.

In *City of Mobile v. Bolden*, Justice Stewart's plurality opinion holds that proof of a racially discriminatory motive is essential for a plaintiff to prove a violation of either the Fourteenth or Fifteenth Amendments. "[A]ction by a state that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose." *Mobile v. Bolden*, *supra*, 446 U.S. at 62, 100 S.Ct. at 1497. In the instant case, despite the State of Arkansas' history of official racial discrimination, plaintiffs failed to show that either West Helena's adoption of the at-large method of electing aldermen or the State's adoption of Ark. Stat. Ann. §§19-1002.5 and 19-1002.7 was motivated by a discriminatory purpose. The statement of the Court of Appeals in *Dove v. Moore*, *supra*, 539 F.2d at 1155, approving a similar political system employed by the City of Pine Bluff, seems pertinent: "While the at-large system is not designed to maximize the number of minority candidates elected, it serves other values[24] and is not an unconstitutional means of implementing the democratic process.

---

[24] See *Mobile v. Bolden*, 446 U.S. 55, 71 n. 15, 100 S.Ct. 1490, 1502, n. 15, 64 L.Ed.2d 47, where it is noted that "a system of at-large city elections in place of election of city officials by the voters of small geographic wards was universally heralded not many years ago as a praiseworthy and progressive reform of corrupt municipal government."

[3, 4] Justice Stewart's opinion makes clear that the Fifteenth Amendment imposes only one limitation on the states: "It forbids them to discriminate against Negroes in matters having to do with voting." 446 U.S. at 61, 100 S.Ct. at 1496. The parties' stipulation in the instant case that all registered voters in West Helena can vote for the candidate of their choice from those electing to be candidates for municipal office is conclusive as to plaintiffs' claim under the Fifteenth Amendment. See *Mobile, supra*, 446 U.S. at 65, 100 S.Ct. at 1498-1499.

[5] Moreover, Justice Stewart holds that the protection afforded by Section 2 of the Voting Rights Act, 42 U.S.C. §1973, is coterminous with the Fifteenth Amendment and adds nothing to plaintiffs' Fifteenth Amendment claim.

There remains for consideration plaintiffs' contention that the defendants' at-large election system violates the Fourteenth Amendment. The Court will examine this argument in light of the plurality opinion in *Mobile* and also in light of the analyses proposed in the various separate opinions in that case.

[6] Justice Stewart's opinion for four members of the Court notes that multi-member legislative districts have not been held to be unconstitutional *per se*. He states, however, "such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. [Citations omitted.] To prove such a purpose, it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. [Citations omitted.] A plaintiff must prove that the disputed plan was 'conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination.' " [Citation omitted.] 446 U.S. at 66, 100 S.Ct. at 1499. Justice Stewart cites *Washington v. Davis* to support "the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment." *Id.* The

opinion elaborates in a footnote on the nature of the discriminatory animus which must be shown to make out an Equal Protection violation: " 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences . . . It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely in spite of,' its adverse effects upon an identifiable group." 446 U.S. at 72 n. 17, 100 S.Ct. at 1502 n. 17, quoting *Personnel Administrator of Mas. v. Feeney*, 442 U.S. 256 at 279, 99 S.Ct. 2282, at 2296, 60 L.Ed.2d 870.

[7] Also worthy of note is Justice Stewart's observation concerning the relevancy of historical discrimination by the state to the claim at bar: "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory motive has been proved in a given case." Thus, this Court must not rely too heavily on this State's history of discrimination in assessing the constitutionality of West Helena's at-large electoral system.

[8] With these points from Justice Stewart's opinion in mind, the Court makes the following legal conclusions with respect to plaintiffs' Fourteenth Amendment claim:

1) Citizens of West Helena register and vote in municipal elections for the candidates of their choice without hinderance and no group is denied access to the political system.

2) Although there is substantial evidence of bloc voting, particularly in the Black Voting Areas, the support of Blacks may be necessary to win elections and accomplish some political objectives in West Helena.

3) The City Council does and has maintained a policy of open meetings in which the grievances of any group

may be heard. Blacks have often been heard by the Council and, although the Council has often failed to act favorably on their requests, in every instance cited the grievance was acknowledged and discussed.

4) There was no showing that West Helena's adoption of the at-large method of election of aldermen when the city was incorporated as a city of the first class in 1920 was motivated in any way by a desire to effect or perpetuate racial discrimination.

5) The evidence was not persuasive that the at-large method of aldermanic elections has been retained because of a desire to perpetuate racial discrimination. Rather, the more persuasive evidence was that the City has retained the present system primarily because of a belief that at-large elections best serve the interest of the city as a whole. Ward elections, it is believed, would result in the accentuation of "local" interests at the expense of the common needs of the general population.

6) Although candidates run for particular positions, because they are elected by a plurality head-to-head contests are not inevitable.

7) There was some evidence of past discrimination by the City in employment and in the delivery of municipal services. This is, however, "most tenuous and circumstantial evidence of the constitutional invalidity of electoral system." *Mobile, supra*, 446 U.S. at 74, 100 S.Ct. at 1503. While instances of discrimination by the City in employment or services may entitle plaintiffs to some legal relief, it would be of a far different sort from that sought here.

8) The City of West Helena and its citizenry has a substantial interest in maintaining the present system of at-large elections.

Because the *Mobile* case does not contain an opinion speaking for a majority of the Court, it seems advisable to assess plaintiffs' claim in light of the analyses suggested in the various separate opinions as well.

Justice Blackmun's opinion, concurring in the result, assumes that proof of intentional discrimination is a prerequisite to a constitutional claim of vote dilution. Yet he found, in agreement with Justice White, that the record in the *Mobile* case "amply support[s] an inference of purposeful discrimination." 446 U.S. at 80, 100 S.Ct. at 1507. Justice Blackmun voted to reverse based on his belief that the remedy afforded by the District Court and approved by the Court of Appeals was an abuse of judicial discretion. His opinion offers no support for plaintiffs' claim in the instant case.

[9] Justice Stevens, concurring in the judgment, takes a somewhat different approach to allegations of vote dilution. He would find the Fifteenth Amendment applies to such cases based on the Court's historic opinion in *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110. And he indicates that both the Fourteenth and Fifteenth Amendments may condemn gerrymanders aimed at other social and political groups. While acknowledging that the Constitution does not establish a right to proportional representation by minorities, Justice Stevens posits a three-prong test for cases alleging gerrymandering or vote dilution: (1) Whether the districting configuration chosen was "'uncouth,' that is to say, was manifestly not the product of a routine or traditional political decision;" (2) whether the scheme "had a significant adverse impact on a minority group;" (3) whether the districting scheme was "unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority." 446 U.S. at 90, 100 S.Ct. at 1512. The test or criteria articulated by Justice Stevens focuses more on the objective effects of a political decision than the motivation of the decision maker. Moreover, he concedes "that a political decision that affects group voting rights may be valid even if it can be proved that

irrational or invidious factors have played some part in its enactment or retention." *Id.* at 91, 100 S.Ct. at 1512. Human motives are, of course, rarely pure.

When the Stevens criteria are applied to the present case, it is clear that the plaintiff's cannot succeed. First, the use of at-large aldermanic elections is not "uncouth" or offensive; rather its selection and retention by West Helena has been the product of a traditional political decision. Second, it is not clear that the scheme of at-large elections has a significant impact on the minority group, particularly in light of the suggested alternative, which would likely assure blacks of permanent minority representation on the City Council with the majority of white council members having no accountability to the black population. Third, the at-large election scheme is not totally irrational and is supported by neutral justifications.

The Court finds it inappropriate to analyze this case under the theories expressed in the dissenting opinions of Justices White and Marshall. We express no opinion as to the hypothetical outcome of this case were those theories applied.

[10] There remains for consideration however, plaintiffs' claim that the existing wards of West Helena are not substantially equal in size as required by Arkansas law. See Ark. Stat. Ann. §19-1002.7. The Court concludes that the issues presented by the large disparity in size of the West Helena wards must be resolved in a proceeding before the Circuit Court of Phillips County, as prescribed by Ark. Stat. Ann. §19-1005 (Repl. 1980), rather than in this Court. Section 19-1005 provides a novel and streamlined procedure whereby 100 citizens of a city may petition the Circuit Judge of the county in which the city is located for an order appointing a commission to re-draw the lines of unequal wards. Such a commission consists of three members, and is empowered "to divide the city into such number of wards, having as nearly equal population as practicable, as, in their opinion, will best subserve the true interests of the citizens and taxpayers of

such city." The statute further provides for the circuit judge to hold a hearing on the petition not less than three days after its presentation. If the judge finds the allegations to be of sufficient merit to warrant appointment of a commission, the commissioners are directed to develop a proposal for redividing the city and to submit their proposal to the judge within ten days of their appointment. If the judge approves the proposal, it is filed in the office of the Circuit Clerk and then becomes the official division of the city into wards. Moreover, the actions of the circuit judge are "final and not subject to any appeal", which presumably accounts for the lack of any decisions by the Arkansas Supreme Court construing the statute.

For purposes of our decision to refer plaintiffs to the Phillips County Circuit Court under §19-1005, the Court assumes without deciding that the plaintiffs have demonstrated the violation of both a federal right under the "one man, one vote" principle, and a violation of a right under Arkansas law. Both of these assumptions are not, however, free from doubt. First, it is questionable that reapportionment cases, such as *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), would condemn the unequal wards in West Helena since all aldermen are elected city-wide. A vote in one ward has as much weight in a city-wide election as does a vote in any other ward. Additionally, although the public policy expressed in Ark. Stat. Ann. §19-1005 and 19-1002.7 clearly favors wards of equal size, it is not clear that these statutes *require* wards of equal size when the city-wide election method is employed. Nonetheless, the Court assumes *arguendo* that plaintiffs have demonstrated the existence and violation of a federal right and a state right which would ordinarily be subject to this Court's pendent jurisdiction. The Court's conclusion is that despite the general rule against requiring exhaustion of state administrative or judicial remedies in suits under §1983, we must refer the plaintiffs to the remedy provided in Ark. Stat. Ann. §19-1005.

Our conclusion in this regard is supported by cases such as *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1942), and *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951). Although these cases have often been discussed in the context of the abstention doctrine, *see e.g., Currie Federal Courts: Cases and Materials*, 674-677 (2d ed. 1975); Note, 73 *Yale L.J.* 850 (1964), the better interpretation of the *Burford* and *Alabama* cases seems to be that they are not abstention cases at all. Rather, they have been interpreted as manifestations of the equitable doctrine of comity. *See* Liebenthal, "A Dialogue on England: The England Case, Its Effect on the Abstention Doctrine and Some Suggested Solutions," 18 *Western Reserve Law Review*, 157-165 (1966).

The *Burford* and *Alabama* cases are, of course, distinguishable from the case at bar in that they specifically require federal courts to give deference to state *regulatory* schemes, including the states' established patterns of judicial review. Yet certain special factors involved in the Arkansas statutory proceeding lead this Court to deny federal relief on the basis of comity. First, the Court is impressed with the speed with which action may be taken under §19-1005. The hearing on the petition must be held within three days of its presentation, and the commission must report its proposal within ten days. It seems unlikely that this Court could act with such dispatch. Second, the Commission contemplated by the statute seems to have some aspects of a regulatory commission. Its proceedings may be expected to be somewhat informal and thus better suited to the resolution of this knotty problem. Moreover, the geography of problem-solving indicates that local people familiar with the particulars of the City are likely to be more adept at re-drawing their ward boundaries than would be this Court. Third, that §19-1005 allows for no appeal from the Circuit Court's determination seems favorable in that implementation of the right will not be delayed by lengthy appellate court proceedings.

For the reasons stated in this opinion, it is hereby ordered that the complaint be dismissed and the relief prayed for denied.

APPENDIX III

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

(Filed May 6, 1982)
(Robert D. St. Vrain, Clerk)

REVEREND P.L. PERKINS, PHILLIPS COUNTY CONCERNED CITIZENS, SAM BENNETT, JOHN HAMILTON, MRS. LILLIE MAE STEVENSON, WILSON RODGERS, REVEREND JULIUS McGRUDER, WELTON DAVIS, REVEREND C.W. GILCREAST AND ORTHA BUSH — PLAINTIFFS-APPELLANTS

VS. — NO. 81-1516

CITY OF WEST HELENA, ARKANSAS, MAYOR JESSE PORTER, CITY COUNCILMEN, BOB TEETER, DICK CUNNINGHAM, TOMMIE DIAL, CHARLES MILES AND DWIGHT GALLOWAY — DEFENDANTS-APPELLEES

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Appellees above named, hereby appeal to the Supreme Court of the United States from the April 13, 1982 decision of the United States Court of Appeals reversing and remanding the order and judgment of the District Court.

This appeal is taken pursuant to 28 U.S.C. 1254 (2).

RALPH C. MURRAY
City Attorney
115 North Sebastian Street
Box 2397
West Helena, Arkansas 72390

and

BYRON FREELAND
MITCHELL, WILLIAMS & SELIG
1000 Savers Federal Building
Little Rock, Arkansas 72201

Attorneys for Defendants-Appellees

/s/ Byron Freeland
Byron Freeland

CERTIFICATE OF SERVICE

I, Byron Freeland, do hereby certify that on this 5th day of May, 1982, a copy of the foregoing Notice of Appeal was mailed, postage prepaid, to the counsel for the parties herein as follows:

Ms. Janet L. Pulliam
Mr. P.A. Hollingsworth
Suite 900
Tower Building
Little Rock, Arkansas 72201

Mr. William L. Robinson
Mr. Norman J. Chachkin
Ms. Lezli Baskerville
Lawyers' Committee for Civil Rights
Under Law
733 15th Street N.W.
Suite 520
Washington, D.C. 20005

Mr. R.B. Friedlander
Assistant Attorney General
Litigation Division
Office of Attorney General
Justice Building
Little Rock, Arkansas 72201

/s/ Byron Freeland
Byron Freeland

Office-Supreme Court, U.S.
FILED
AUG 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF WEST HELENA, ARKANSAS, *et al.*,
Appellants,

v.

REVEREND P. L. PERKINS, *et al.*

On Appeal from the United States Court of Appeals for the Eighth Circuit

---

MOTION TO DISMISS OR AFFIRM

---

* P. A. HOLLINGSWORTH
JANET L. PULLIAM
Suite 955, Tower Building
Little Rock, Arkansas 72201
(501) 372-0400

WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
DEBRA A. MILLER
Lawyers' Committee for
Civil Rights Under Law
733 15th Street, N.W.
Suite 520
Washington, D.C. 20005
(202) 628-6700

Attorneys for Appellees

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
Table of Authorities	i
Statement	2
ARGUMENT—	
I. This appeal should be dismissed because this Court lacks jurisdiction under 28 U.S.C. § 1254(2)	5
II. The judgment below should be affirmed or certiorari should be denied inasmuch as no substantial question warranting plenary review is presented in this case	7
Conclusion	18

TABLE OF AUTHORITIES

Cases

Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974) 17
City of Mobile v. Bolden, 446 U.S. 55 (1980) 2, 6, 10, 14
Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) 11, 13
Detroit v. Murray Corp., 355 U.S. 497 (1958) 7
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 2, 5, 7-8
Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970) 7
Hutto v. Finney, 437 U.S. 678 (1978) 17
Malone v. White Motor Corp., 435 U.S. 497 (1978) 7
Minnesota v. Alexander, 430 U.S. 977 (1977) 6
NAACP v. Claiborne Hardware Co., 50 U.S.L.W. 5122 (U.S., July 2, 1982) 12n
New Orleans v. Dukes, 427 U.S. 297 (1976) 5
Pullman-Standard Co. v. Swint, 50 U.S.L.W. 4425 (U.S., April 27, 1982) 10, 12
Rogers v. Lodge, 50 U.S.L.W. 5041 (U.S., July 1, 1982) 1, 6, 8, 9, 11, 13
Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 4n

TABLE OF AUTHORITIES—Continued

	Page
Thorpe v. Housing Auth. of Durham, 393 U.S. 268 (1969)	17
United States v. Schooner Peggy, 5 U.S. (1 Cr.) 42 (1801)	17
White v. Regester, 412 U.S. 755 (1973)	8, 9n
Zimmer v. McKeithen, 458 F.2d 1297 (5th Cir. 1973), aff'd on other grounds sub nom. East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1975)	9n
Statutes and Rules	
28 U.S.C. § 1254(2)	5, 6, 8
28 U.S.C. § 2103	2, 7
Voting Rights Act of 1965, § 2, 42 U.S.C. § 1973	2, 13, 14
P.L. 97-205, 96 Stat. 131 (1982)	2, 13, 14
Ark. Stat. Ann. § 19-1002.7 (Repl. 1980)	5-6
Sup. Ct. Rule 16.1(a), (c), (d)	1
Legislative Materials	
S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982)	15, 16
128 Cong. Rec. (1982)	15n, 16, 17
S. 1992, 97th Cong., 2d Sess. (1982)	15n
H.R. 3112, 97th Cong., 2d Sess. (1982)	15n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-55

CITY OF WEST HELENA, ARKANSAS, *et al.*,
Appellants,

v.

REVEREND P. L. PERKINS, *et al.*

On Appeal from the United States Court of Appeals for the Eighth Circuit

---

MOTION TO DISMISS OR AFFIRM

Appellees respectfully move, pursuant to Sup. Ct. Rule 16.1(a), (c), and (d), that the Court dismiss this appeal because it lacks jurisdiction thereof since no state statute or local ordinance was held invalid by the court below; or in the alternative, that the Court summarily affirm the judgment below because no susbtantial federal questions requiring further development or oral argument are presented since the case is governed by, and the ruling below is fully consistent with, the decision in *Rogers v. Lodge*, 50 U.S.L.W. 5041 (U.S., July 1, 1982). The judgment of the Court of Appeals for the Eighth Circuit is also subject to affirmance because it is manifestly correct under

§ 2 of the Voting Rights Act of 1965, as amended by § 3 of P.L. 97-205, 96 Stat. 131 (1982), which is now applicable to this case. Finally, treating the Jurisdictional Statement as a Petition for Writ of Certiorari, *see* 28 U.S.C. § 2103; *Doran v. Salem Inn., Inc.*, 422 U.S. 922, 927 (1975), the writ should be denied.

STATEMENT

This suit was filed in 1978, challenging the adoption and continuation of at-large elections for aldermen (city council members) in West Helena, Arkansas. Plaintiffs (appellees here) claimed that this election scheme dilutes the voting strength of the city's Black community in violation of section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. The case was tried in the fall of 1980, and the district court issued its decision on April 10, 1981 (App. 36-37,[1] 514 F. Supp. 770).

Relying upon *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the trial court rejected plaintiffs' Fifteenth Amendment claim on the ground that no direct interference with the right to cast a ballot had been demonstrated (App. 60, 514 F. Supp. at 780) and plaintiffs' statutory claim on the ground that § 2 of the Voting Rights Act was coextensive with the Fifteenth Amendment (*id.*). The district court also rejected plaintiffs' Fourteenth Amendment claim of vote dilution because, in its view, plaintiffs had failed to prove that the at-large election system was adopted or maintained "to effect or perpetuate racial discrimination" (App. 62, 514 F. Supp. at 781).

On appeal, a panel of the Eighth Circuit unanimously reversed (App. 1-35, 675 F.2d 201). The panel accepted

[1] Citations in this form refer to the Appendix to the Jurisdictional Statement filed herein.

the lower court's conclusion that West Helena did not adopt at-large voting in 1920 for the purpose of racial discrimination. However, it held "clearly erroneous" the district judge's finding that West Helena's adherence to the at-large system was free of discriminatory intent (App. 34, 675 F.2d at 216) and ruled that plaintiffs' showing of the city's discriminatory motivation for retaining at-large elections established violations of § 2 of the Voting Rights Act and of the Fifteenth Amendment, as well as of the Fourteenth Amendment to the United States Constitution (App. 11-12 & nn.5, 6, 14 n.8, 34, 675 F.2d at 205-06 & nn.5, 6, 207 n.8, 216).

Most of the relevant facts are set out in the opinions below, which are reprinted in the appendix to the Jurisdictional Statement (App. 1-35, 36-47). Appellants' "Statement of the Case," however, not only lacks any citation to the record; it also omits important elements of the proof introduced below and of the findings made by the trial court. We treat most of these matters in the course of the Argument, *infra*. It is important here to stress only the failure of appellants to acknowledge the extent to which the Black community in West Helena has been prevented from electing candidates of its choice to the city council. Appellants' recitation that "[b]etween 1966 and 1978, twelve blacks have been candidates for council positions and three have been elected" (J.S. 7 [2]) is a convenient but gross understatement. In fact, only three Blacks have served on the city council since West Helena was incorporated in 1917 (App. 41, 44, 514 F. Supp. at 772, 773) and each was able to be elected only in contests in which he faced more than a single white opponent (App. 46, 514 F. Supp. at 774; Tr. 53,[3] 68, 129, 258). Whenever a Black has run for an aldermanic position, there has been consistent racial bloc voting which

[2] Citations in this form are to the Jurisdictional Statement.

[3] Citations to "Tr. ——" refer to the transcript of proceedings before the district court on September 29 and 30, 1980.

prevents a Black candidate from winning in a head-to-head contest against a white opponent (App. 46, 514 F. Supp. at 774; Tr. 57, 109, 136, 248, 300).[4] In remarks at the conclusion of the trial, the district court recognized how at-large voting presents Blacks in West Helena with a "loaded game board" [5] (Tr. 464-65):

> . . . under the present system I think it does work, because of the block voting, to decrease a black person's chance of being elected to the City Council. I don't think there's any question about that . . .
>
> . . .
>
> Now, I can understand that the election system as a whole, the electing at large, can be used as a tool to effectively cut out black representation on the Council. And I guess the question is whether or not there was a deliberate intent that was carried out to do that in this case that over-balances or outweighs the benefits of having people reside in wards and stand for election as a whole.

While there is no majority-vote-to-win requirement, the ward residency and numbered-place provisions promote head-to-head contests in West Helena between Black and white candidates (App. 25, 675 F.2d at 212; *cf.* App. 62, 514 F. Supp. at 781 (head-to-head contests "not inevitable")).[6]

---

[4] The city refers to the 1980 appointment of a Black to fill a council vacancy (J.S. 7); not only was this action taken long after this lawsuit was filed, but it was also the first instance in the city's history of a Black receiving a vacancy appointment (Tr. 128).

[5] *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971).

[6] The impediment to Black representation on the council created by the at-large system with residency and place requirements has also contributed to low rates of participation by Blacks in the political affairs of the city because of the feeling that votes in city-wide elections served no purpose (Tr. 198; App. 47, 514 F. Supp. at 775).

ARGUMENT

I. This appeal should be dismissed because this Court lacks jurisdiction under 28 U.S.C. § 1254(2).

Appellants claim this Court has appellate jurisdiction to review the holding of the Eighth Circuit pursuant to 28 U.S.C. § 1254(2), and that its jurisdiction "is supported by *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *New Orleans v. Dukes*, 427 U.S. 297 (1976)" (J.S. 2). These cases are inapposite and there is no basis for the construction which appellants would give to § 1254(2). This appeal must be dismissed for want of jurisdiction.

Section 1254(2) provides that this Court shall have appellate jurisdiction over cases from the United States Courts of Appeals where the appellant "rel[ies] on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ." The instant appeal is prosecuted by the City of West Helena and several of its officers (defendants in the trial court),[7] but it cannot be said either that appellants are "relying on a State statute" nor that any enactment was "held by a court of appeals to be repugnant to the Constitution, treaties or laws of the United States."

Nowhere in their description of the "substantial question" presented by this appeal (*see* J.S. 9-13) do appellants even advert to, much less rely upon, any state statute or local ordinance.[8] Under Ark. Stat. Ann. § 19-

---

[7] The State of Arkansas was a party below, having intervened as a defendant "for the sole purpose of defending constitutionality of challenged Arkansas statutes." Brief of Appellee, State of Arkansas, *Perkins v. City of West Helena*, 8th Cir. No. 81-1516, at 2. The State of Arkansas has not appealed from the ruling of the Eighth Circuit.

[8] We recognize that ordinances have been treated as the equivalent of state statutes for purposes of 28 U.S.C. § 1254(2). *E.g.*, *New Orleans v. Dukes* and *Doran v. Salem Inn, Inc.*, cited by appellants. However, appellants fail to identify any local ordinance

1002.7 (Repl. 1980) (J.S. 5), which has been applicable throughout the course of this litigation (App. 43-44, 514 F. Supp. at 773), the decision whether to retain at-large elections for city council positions in West Helena is the city council's alone; the Arkansas statute authorizes either at-large or ward elections, at the option of the city.[9] For this reason, appellants have never, in this litigation, defended their continuation of at-large city council elections by claiming that such contests are required or favored by any state law.

Similarly, appellants do not identify where in its opinion the court below "held [a state statute or ordinance] repugnant to the Constitution, treaties or laws of the United States." Although the Court of Appeals properly considered the actual operation of the West Helena city council voting scheme, including elements attributable to state law (App. 25, 675 F.2d at 212), its opinion contains no statement that any statute or ordinance is invalid. In the absence of a clear indication to this effect, this Court would appear to lack jurisdiction under § 1254(2). *See Minnesota v. Alexander*, 430 U.S. 977 n.1 (1977) (Stevens, J., dissenting).

Furthermore, the ruling below does not amount to holding any law invalid as applied. Since the state law does not, by its terms, mandate the use of only at-large elections in West Helena, this suit is distinguishable from *City of Mobile v. Bolden*, 446 U.S. 55, 59-60 (1980) and *Rogers v. Lodge*, 50 U.S.L.W. 5041, 5041-42 (U.S., July 1, 1982). In those cases, this Court had appellate jurisdiction from decisions of the Fifth Circuit because invalidation of the at-large voting systems of Mobile and

---

of the City of West Helena upon which they seek to rely, or which was held invalid by the Court of Appeals.

[9] The parties stipulated that "[t]he State of Arkansas has no legislative policy which prefers at-large elections" (App. 44, 514 F. Supp. at 773).

Burke County necessarily implied a holding that state statutes requiring at-large voting were, at least as applied to the two localities, inconsistent with federal law. *See, e.g., Malone v. White Motor Corp.*, 435 U.S. 497, 499 (1978); *Detroit v. Murray Corp.*, 355 U.S. 497, 499 (1958).

Finally, no West Helena ordinance of any kind is involved in this case and none was held invalid either explicitly or by implication. The most which can be said is that West Helena's *failure to adopt an ordinance* for ward elections was a key factor in the Court of Appeals' determination that unconstitutional conduct had occurred. To be sure, this case would be in a different posture if the Arkansas law had required ward elections in the absence of a local ordinance providing for at-large contests, and if the city council of West Helena had adopted such an ordinance. Plaintiffs-appellees would in such circumstances, of necessity, be challenging the constitutionality of an ordinance, and the Court of Appeals' decision would be reviewable here by way of appeal. *See* note 8 *supra*. This does not, however, furnish a basis for appellate jurisdiction over the present case. The statutes defining this Court's obligatory jurisdiction are strictly construed. *E.g., Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (holding Court had no appellate jurisdiction over decision of federal court of appeals invalidating statute of Puerto Rico).

For these reasons, the appeal should be dismissed for lack of jurisdiction.

II. The judgment below should be affirmed or certiorari should be denied inasmuch as no substantial question warranting plenary review is presented in this case.

If the Court agrees that it lacks appellate jurisdiction over this matter and dismisses the city's appeal, it must nevertheless consider whether review by way of *certiorari* would be appropriate. 28 U.S.C. § 2103; *see Doran v.*

Salem Inn, Inc., 422 U.S. 922, 927 (1975). We submit that because no substantial issues warranting further briefing or oral argument have been raised by the city, the Court should not grant the writ. These same considerations compel summary affirmance of the judgment below if the Court sustains appellate jurisdiction under 28 U.S.C. § 1254(2).

A.

West Helena argues essentially that because of minor factual differences between this case and *White v. Regester*, 412 U.S. 755 (1973) or *Rogers v. Lodge*, 50 U.S.L.W. 5041 (U.S., July 1, 1982), the judgment below is erroneous.[10] This approach to adjudication trivializes the function of the Court. Because the Eighth Circuit

---

[10] For example, appellants emphasize that West Helena's at-large system does not include a majority-vote requirement, as did those in Dallas, Bexar and Burke Counties (J.S. 11). It is significant, however, that each time a Black was elected to the West Helena council because the white vote was split between two white candidates, the Black was then defeated for reelection in a head-to-head contest against a single white opponent (App. 46, 514 F. Supp. at 774). Moreover, in weighing "the totality of the circumstances to determine whether the at-large electoral system was created or maintained to accord the members of the allegedly injured group less opportunity than other voters to participate meaningfully in the political process and elect legislators of their choice" (App. 18, 675 F.2d at 209), the Court of Appeals recognized that the absence of a majority-vote requirement "decrease[d] the likelihood that West Helena's electoral system is being maintained for a discriminatory purpose" (App. 23, 675 F.2d at 211). But it properly held that this single factor was not dispositive and concluded, "[o]n the basis of the direct and circumstantial evidence in this case," "[a]fter carefully reviewing the record and briefs, and hearing oral argument," that the at-large system was being maintained for discriminatory purposes and that the district court's contrary finding was "clearly erroneous" (App. 34, 675 F.2d at 216).

Appellants also urge that *Rogers* is distinguishable because no Black had ever been elected to the Burke County commission, while three Black persons have won single terms on the West Helena city council (J.S. 11, 12). Clearly, however, an at-large system need not be so efficient as to exclude minority candidates completely in order

correctly applied the legal principles announced in earlier cases and confirmed in *Rogers*, its judgment should not be disturbed.

The central issue in this case, through trial and appeal, was whether at-large elections in West Helena—which admittedly make it difficult for the Black community to elect representatives of their choosing—were adopted initially or were currently being retained for

---

to be condemned under the Fourteenth Amendment. In *White v. Regester*, 412 U.S. at 766, 768-69, this Court noted that two Blacks from Dallas and five Mexican-Americans from Bexar County had served in the Texas legislature. Nevertheless, the multi-member legislative districts involved in that case were held to violate the Constitution by diluting the voting strength of minorities, who had "*less* opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 766 (emphasis added).

West Helena's focus upon narrow factual distinctions between this case and *White* or *Rogers* recalls the discredited view that proof of some combination of enumerated factors, without more, will establish a constitutional violation—the very interpretation of *Zimmer v. McKeithen*, 458 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1975) (*per curiam*) which was rejected by this Court—*see Rogers v. Lodge*, 50 U.S.L.W. at 5043. The approach of the court below was consistent with *Rogers*:

> The absence or presence of some, or all, of the *Zimmer* factors, however, is not conclusive of the discriminatory purpose issue. . . .
>
> . . . In determining whether a discriminatory purpose existed, no set of factors, including those suggested in *Zimmer* and *Arlington Heights*, is dispositive of the question of intent. Moreover, even if all of the *Zimmer* and *Arlington Heights* factors are established, an inference of discriminatory intent is not necessarily to be drawn. The district court must consider the totality of circumstances to determine whether the at-large electoral system was created or maintained to accord the members of the allegedly injured group less opportunity than other voters to participate meaningfully in the political process and elect legislators of their choice.

(App. 17-18, 675 F.2d at 208-09.)

racially discriminatory purposes. The district court viewed the evidence as insufficient to establish discriminatory intent, describing its holdings as "legal conclusions" (App. 61-62, 514 F. Supp. at 781-82). The Court of Appeals reversed with respect to the city's continued adherence to at-large elections. It both found legal error affecting the trial judge's evaluation of the proof and also concluded that the ultimate holding of no invidious purpose was a "clearly erroneous" finding. *Cf. Pullman-Standard Co. v. Swint*, 50 U.S.L.W. 4425 (U.S., April 27, 1982).

1. The district court made extensive findings of unresponsiveness by the city council to the legitimate desires and needs of the Black community (App. 50-55, 514 F. Supp. at 776-78),[11] but it gave almost no weight to this evidence—based upon its reading of the plurality opinion in *Bolden* (App. 62, 514 F. Supp. at 782). The Court of

---

[11] Appellants seek to minimize the extensive record evidence of the council's refusal to address the needs of West Helena's Black community by asserting that "the black wards have received approximately $357,000 more in improvement funds than have the white wards" (J.S. 7). The evidence on street improvements (from which this figure was apparently derived) does not establish what the city seeks to imply: that these funds were expended only in Black residential areas of Wards 1 and 4. The evidence presented by the city to the trial court did not distinguish between expenditures in predominantly Black and predominantly white residential areas within the wards (Tr. 350-51; *see* Tr. 369-70). In any event, differential current expenditures of this magnitude would merely confirm the severe neglect of Black residential areas by West Helena's governing body in the past (App. 21, 675 F.2d at 210-11; App. 53, 514 F. Supp. at 777; *see* Tr. 52, 69-70, 91, 96-100, 118, 148-67, 268, 277-78, 311, 315-16, 382-83, 461).

Moreover, 70% of expenditures for street improvements during the time period covered by the city's exhibits, as the district court noted, were from federal grant funds rather than local revenues (App. 53, 514 F. Supp. at 777). Obtaining an equitable share of municipal services is an important reason why Blacks seek political office in West Helena (Tr. 52, 148-54; App. 48-49, 54-55, 514 F. Supp. at 775, 778).

Appeals recognized that such evidence *is* "probative of a finding that the at-large system is being maintained for a discriminatory purpose" (App. 21-22, 675 F.2d at 211), and its approach is confirmed by the majority opinion in *Rogers*, 50 U.S.L.W. at 5044 & n.9 (unresponsiveness "increases the likelihood that the political process was not equally open to blacks").

The Court of Appeals also rejected the district judge's conclusion that "[all] [c]itizens of West Helena register and vote in municipal elections for the candidates of their choice *without hindrance* . . ." (App. 61, 514 F. Supp. at 781) (emphasis added) because it was inconsistent with the trial court's subsidiary factfinding about impediments to Black participation in the political processes of West Helena (App. 18-20, 675 F.2d at 209-10). This is certainly unexceptionable performance of the task of an appellate court. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 534-36 & n.8 (1979).

Perhaps most significant, the Court of Appeals thoroughly canvassed the record evidence bearing upon the reasons why the city council refused to switch to ward elections when it was petitioned to do so by the Black community in 1977. It concluded that the district judge had erred in accepting after-the-fact rationalizations described in the trial testimony of the current and former Mayors of West Helena[12] (App. 27-30, 675 F.2d at 213-14). The Court of Appeals' determination is strongly supported by the direct evidence in the record: the official council minutes from 1977 contain one alder-

---

[12] Jesse Porter, the Mayor of West Helena from 1952 to 1979, testified that at-large elections were preferable to ward elections in terms of producing a council responsive to all citizens and interests (Tr. 380). But Porter did not vote on the issue in 1977 (*see* PX 37; App. 57 n.22, 514 F. Supp. at 779 n.22). He also testified that throughout his entire administration, both the Mayor and council had always been responsive to the Black community (Tr. 387); of course, the district judge found, and appellants concede, to the contrary (J.S. 7, 10; App. 50-55, 514 F. Supp. at 776-78).

man's statement opposing ward elections because "I do not think you would have fair representation as far as white people are concerned with the four wards" (PX 37, *see* App. 57 n.22, 514 F. Supp. at 779 n.22); a current alderman—who lost to a Black candidate in a three-way race in 1976 and regained his seat by defeating the same Black candidate in a head-to-head race in 1978 (Tr. 129-36)—testified that he opposed the ward election system because "there's more black people that live in the ward that I live in than white people" (Tr. 248, quoted at App. 28-29, 675 F.2d at 214); the request for ward elections was presented to the council as one of a list of grievances involving racial discrimination against Blacks in West Helena, in the midst of a peaceful boycott by the Black community [13] (*see* App. 48, 514 F. Supp. at 775). Active West Helena political figures who appeared at the trial, Black and white, testified that the city's racial residential segregation and its pattern of racial bloc voting were well known, and that in combination with the at-large system gave white voters the power to prevent the election of Blacks (Tr. 53, 57, 109, 130-32, 248, 258, 300, 389, 291, 449-50).

2. When such intermediate legal and factual mistakes were corrected by the Court of Appeals, it was left with a record which could not sustain the district court's ultimate determination respecting discriminatory intent. Giving appropriate probative weight to evidence the lower court had ignored, and viewing the "totality of the circumstances," the Court of Appeals held that ultimate finding was "clearly erroneous" (App. 34, 675 F.2d at 216). Contrary to appellants' claim (J.S. 12), this was not improper. As we have demonstrated, and unlike *Pullman-Standard Co. v. Swint*, *see* 50 U.S.L.W. at 4428, 4430 & n.21, the court below carefully assessed all of the subsidiary fact-finding by the trial court, giving appropriate

---

[13] *See NAACP v. Claiborne Hardware Co.*, 50 U.S.L.W. 5122 (U.S., July 2, 1982).

deference to findings which were adequately supported and making necessary modifications and corrections to findings which were not, before passing upon the central issue of discriminatory intent. *See Rogers v. Lodge*, 50 U.S.L.W. at 5044. Since the Eighth Circuit panel faithfully applied the "clearly erroneous" standard, *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. at 534 n.8, and since its conclusions are fully consistent with *Rogers v. Lodge*, this case presents no substantial issues justifying a grant of certiorari or further briefing and oral argument.

B.

The need for plenary review in this case is further diminished by the recent passage of the Voting Rights Act Amendments of 1982, P.L. 97-205, 96 Stat. 131 (1982). The text and legislative history of that statute demonstrate that the changes it makes to § 2 of the Voting Rights Act were intended to apply to pending cases and also that they were designed to eliminate the necessity for proving "discriminatory intent" in order to establish a § 2 violation.

Section 3 of the measure, 96 Stat. at 134, amends § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, to provide as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its

> members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Both courts below were in agreement that at-large voting for aldermen gives the Black citizens of West Helena "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." They differed only on the question whether plaintiffs had proved that the at-large system was being retained for discriminatory purposes. Therefore, under § 2 as now amended, the judgment below is unquestionably correct and due to be affirmed.

1. In *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980), the plurality interpreted § 2 of the Voting Rights Act (prior to its 1982 amendment) as "intended to have an effect no different from that of the Fifteenth Amendment itself." Because the plurality read the Fifteenth Amendment to proscribe only voting limitations motivated by discriminatory intent, *id.* at 61-64, it applied the same standard to § 2. However, the recent amendment adds critical language giving the statute substantial independent significance. First, in subsection (a), which was previously the entire text of § 2, the amendment changes the phrase "to deny or abridge the right of any citizen of the United States to vote on account of race or color" to read as follows (emphasis added):

> *in a manner which results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), *as provided in subsection (b)*.

Second, the amendment adds an entire new subsection (b) describing how a violation of § 2 is to be established (quoted *supra* pp. 13-14). Thus, the language of § 2, as amended in 1982, is far different from that of the Fifteenth Amendment. The statutory language emphasizes results, not intent, and calls for a judgment based upon the totality of the circumstances rather than proof of discriminatory motivation as an essential element.

2. The legislative history of the 1982 enactment demonstrates that this shift in legal standards was a primary goal of the Congress. The Senate Report on the bill [14] states, under the heading "PURPOSE":

> S. 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure results [*sic*] in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden*. The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White v. Regester*.

S. Rep. No. 97-417, 97th Cong., 2d Sess. 2 (1982) (footnotes omitted). The Report contains an extensive discussion of the Section 2 changes (*id.* at 15-43), explicitly repudiating the "intent" test. Significantly, the Senate Judiciary Committee rejected an amendment to the bill which "would have prevented the existence of an at-large

---

[14] The Senate debated and amended the bill reported out by the Judiciary Committee, S. 1992, and then incorporated it into the House bill, H.R. 3112, as a substitute. 128 Cong. Rec. S7139 (daily ed., June 18, 1982). The House then passed the Senate-amended bill, *id.* at H3839-46 (daily ed., June 23, 1982).

election system from being considered as evidence of a violation of Section 2 of the Act," *id.* at 4.

Senator Mathias, acting as manager, introduced the measure when it reached the Senate floor and stated that "[t]his amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of section 2." 128 Cong. Rec. S6941 (daily ed., June 17, 1982). Later in the debate on that same day, Senator East sought to strike the amendments to § 2 of the Voting Rights Act from the measure in order to restore the "intent" test (*id.* at S6956):

> . . . I would characterize the first amendment I offer as the most significant, substantive one. It addresses an issue of nationwide concern. Specifically, Mr. President, it deals with Section 2 of S. 1992 under which, Mr. President, we would no longer use an intent test of [*sic*] determine whether there has been wrongdoing within the meaning of the civil rights law but would use an effects or results test.
>
> Mr. President, this is a very intriguing departure from the normal way we have protected the right to vote under the 15th amendment.
>
> . . .
>
> My concern is that a wholly new approach to voting is being created under section 2.

Senator East's proposed amendment to the bill was defeated (*id.* at S6965).

In similar fashion, when the Senate-passed bill was considered by the House, the effect of the Section 2 amendments was emphasized. Rep. Edwards, the floor manager, said that the "amendment is designed to make clear that proof of discriminatory intent is not required to establish a section 2 violation. In fact, the imposition of an intent standard under section 2 has been specifically and decisively rejected by both the House and the Senate." *Id.* at H3841 (daily ed., June 23, 1982). Rep. Sensenbrenner was even more explicit (*id.*):

> Let there be no question then. We are writing into law our understanding of the test in White against Regester. And our understanding is that this looks only to the results of a challenged law, in the totality of the circumstances—with no requirement of proving purpose. But should the Highest Court in the land—or a majority of the Court—conclude there is a purpose element in White, then the committee nonetheless has drafted a bill that does not incorporate this requirement, and that is the ultimate legislative intent of the bill we are adopting here today.

There is thus no room to doubt the substantial shift worked by the 1982 Act.

Furthermore, under established principles, the new statute governs disposition of this case. *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974); *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268 (1969); *United States v. Schooner Peggy*, 5 U.S. (1 Cr.) 49 (1801). Prior to its passage by the House of Representatives, application of the new § 2 standards to pending cases was specifically brought to the attention of that body by Rep. Sensenbrenner (128 Cong. Rec. at H3841):

> Section 2, unlike the bailout procedure added by this bill, will take effect immediately and will, of course, apply to pending cases in accordance with the well-established principles of *Bradley v. City of Richmond*, 416 U.S. 686 (1974) and *United States v. Alabama*, 362 U.S. 602 (1960).

See Hutto v. Finney, 437 U.S. 678, 694 n.23 (1978).[18]

As we pointed out above, since both courts below found that at-large voting impeded the ability of Blacks in West Helena to elect representatives of their choice, when the new § 2 is applied to this case, affirmance of the judgment below is compelled.

---

[18] The Voting Rights Act Amendments of 1982 were signed by the President on June 29, 1982.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed and, treating the papers as a petition, the writ of certiorari should be denied; or in the alternative, the judgment below should be affirmed.

Respectfully submitted,

* P. A. HOLLINGSWORTH
JANET L. PULLIAM
Suite 955, Tower Building
Little Rock, Arkansas 72201
(501) 372-0400

WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
DEBRA A. MILLER
Lawyers' Committee for
Civil Rights Under Law
733 15th Street, N.W.
Suite 520
Washington, D.C. 20005
(202) 628-6700

Attorneys for Appellees

* Counsel of Record